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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Vince Chhabria, Judge

IN RE:	FACEBOOK, INC. CONSUMER PRIVACY USER PROFILE LITIGATION.	NO. 18-MD-02843 VC

San Francisco, California
Wednesday, May 29, 2019

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiffs:

KELLER ROHRBACK LLP
1201 Third Avenue - Suite 3200
Seattle, Washington 98101
BY: DEREK W. LOESER, ESQ.
CARI C. LAUFENBERG, ESQ.

BLEICHMAR, FONTI & AULD LLP
555 12th Street, Suite 1600
Oakland, California 94607
BY: LESLEY E. WEAVER, ESQ.
MATTHEW S. WEILER, ESQ.
JOSHUA D. SAMRA, ESQ.
ANNE K. DAVIS, ESQ.

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

REPORTED BY: Ana M. Dub, RDR, CRR, CCRR, CRG, CCG
Official Reporter, CSR No. 7445

APPEARANCES: (CONTINUED)

For Defendant:

GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, New York 10166-0193
BY: ORIN SNYDER, ESQ.

GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
BY: JOSHUA S. LIPSHUTZ, ESQ.

GIBSON, DUNN & CRUTCHER LLP
555 Mission Street - Suite 3000
San Francisco, California 94105
BY: KRISTIN A. LINSLEY, ESQ.

Wednesday - May 29, 2019 **10:34 a.m.**

P R O C E E D I N G S

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(Call to Order of the Court.)

THE CLERK: Calling Case Number 18-MD-2843, In Re Facebook Inc. Consumer Privacy User Profile Litigation.

Can one member from the plaintiff and from the defendant please step forward and state the appearances of your parties.

MR. LOESER: Good morning, Your Honor. Derek Loeser from Keller Rohrback for the plaintiffs. If it's okay with the Court, I'll allow my colleagues to introduce themselves.

THE COURT: Sure.

MS. WEAVER: Good morning, Your Honor. Lesley Weaver, Bleichmar Fonti & Auld.

THE COURT: Good morning.

MS. LAUFENBERG: Good morning, Your Honor. Cari Laufenberg, Keller Rohrback.

THE COURT: Good morning.

MS. DAVIS: Anne Davis, Bleichmar Fonti & Auld.

THE COURT: Good morning.

MR. GOULD: Benjamin Gould, Keller Rohrback.

THE COURT: Good morning.

MR. SAMRA: Good morning, Your Honor. Josh Samra, Bleichmar Fonti & Auld.

THE COURT: Good morning.

MR. WEILER: Good morning, Your Honor. Matthew Weiler, Bleichmar Fonti & Auld, for plaintiffs.

THE COURT: Good morning.

MR. SNYDER: Good morning, Your Honor. Orin Snyder, Gibson Dunn, for Facebook; and I'm joined by my colleagues Josh Lipshutz, Kristin Linsley, and Christopher Leach.

THE COURT: Hi, everyone.

MR. SNYDER: Hi, Judge.

THE COURT: Okay. Why don't I start with Facebook, and why don't we start with the last question that I posed to you, which is, let's assume -- I know you strongly disagree with this; but let's assume, for the sake of argument, that Facebook suggested to its users that if your settings are to share stuff with friends only, only your hundred friends -- let's say a user has 100 friends -- and you adjust your settings so that your posts and your likes and whatnot, your photographs are shared only with your friends, we, Facebook, will make sure not to give anyone else access to that information. Okay? And let's say that in contravention of that assurance, Facebook actually disseminated the photographs and the likes and the posts to hundreds of companies.

Wouldn't that be a really serious privacy violation?

MR. SNYDER: The answer, Your Honor, is no, and I'll explain why.

The answer to your full question is both. We do really

contend that this is not serious enough to give rise to a claim of invasion of privacy or any other privacy --

THE COURT: You also say that that's not what happened. I understand that.

MR. SNYDER: And so let me explain why. Addressing your hundred friends --

THE COURT: Yes.

MR. SNYDER: -- example -- and this really goes to the core of Facebook's argument, both on standing, which I understand we're going to put a pin in and hopefully you'll give me a moment but maybe not, and to consent -- and to the consent questions.

Your Honor, first, the gravamen, obviously, of any privacy tort, including any invasion of privacy tort, is a reasonable expectation of privacy, whether it's seclusion upon intrusion, whether it's public disclosure of private facts, or any constitutional privacy right that may exist under California law.

And what's key here, Your Honor, is that the plaintiffs admit, throughout their lengthy Complaint, that they shared their Facebook information with, in this case, a hundred friends, friends of friends, or even strangers.

THE COURT: Okay. But let's talk about my example.

MR. SNYDER: Okay. Your analysis. Let's just keep it --

THE COURT: Okay.

MR. SNYDER: -- to friends.

Plaintiffs admit they were told that they could control their sharing to not control [sic] with friends. That's part of your hypothetical. Plaintiffs admit they were told by Facebook that Facebook cannot --

THE COURT: Wait. Start over. Okay? Put your talking points away, maybe, and listen to my question. Okay?

My question is, assume -- forget about what the plaintiffs are alleging right now. Okay? We're talking about a hypothetical. Okay?

The hypothetical is, a Facebook user sets her settings so that only her friends can see her photographs.

MR. SNYDER: Yes.

THE COURT: Okay? And Facebook assures the user that if you only share stuff with your friends, we, Facebook, will not give access to those photographs to anyone else.

MR. SNYDER: Yes.

THE COURT: And assume, despite that assurance that Facebook gives the user, that Facebook actually disseminates those photographs to hundreds of companies.

MR. SNYDER: And there are no other disclosures under this hypothetical?

THE COURT: Correct.

MR. SNYDER: Okay.

THE COURT: Okay?

MR. SNYDER: Same answer.

THE COURT: Now, so is that a serious privacy invasion by Facebook?

MR. SNYDER: No. There is no privacy interest, because by sharing with a hundred friends on a social media platform, which is an affirmative social act to publish, to disclose, to share ostensibly private information with a hundred people, you have just, under centuries of common law, under the judgment of Congress, under the SCA, negated any reasonable expectation of privacy.

THE COURT: But, so how is that different from -- okay. Let's say -- I mean, I sort of vaguely remember when I was a kid, my dad would invite a bunch of people over and he would show a slideshow of our family vacation to Europe. Right? And he might invite 20 friends and show them the photographs.

I mean, if somebody gets ahold of that information and disseminates it to a thousand companies --

MR. SNYDER: Yes.

THE COURT: -- isn't that -- I mean, the fact that he showed those slides to 20 people doesn't prevent him from asserting a privacy interest --

MR. SNYDER: It does --

THE COURT: -- in those slides.

MR. SNYDER: -- Your Honor.

And if you let me explain, as a matter of law, it clearly does. The gravamen of any privacy tort is a reasonable expectation of privacy, and whether it's the Restatement, whether it's California common law, whether it is old British -- English common law.

I'll read -- I'll read what the Restatement 652D says (reading):

> There's no tort liability when a defendant merely gives further publicity to information that the plaintiff has already publicized.

It is --

THE COURT: But "publicized," that's an important word --

MR. SNYDER: Yes.

THE COURT: -- right?

MR. SNYDER: Yes, it is. But let me explain.

100 people. The social act of broadcasting your private information to 100 people negates, as a matter of law, any reasonable expectation of privacy. The very premise of Facebook --

THE COURT: You seem to be treating it as a binary thing, like either you have a full expectation of privacy or you have no expectation of privacy at all. And I don't understand why we should think of it in that way.

I mean, if I don't tell anybody something, if I don't share a certain thing with anybody, I have a full expectation of privacy in that. If I share it with ten people, that doesn't eliminate my expectation of privacy. It might diminish it, but it doesn't eliminate it.

And if I share something with ten people on the understanding that the entity that is helping me share it will not further disseminate it to a thousand companies, I don't understand why I don't have -- why that's not a violation of my expectation of privacy.

MR. SNYDER: Because, Your Honor, what the plaintiffs are doing here and what Your Honor's hypothetical suggests is a brand-new right of privacy that has never been recognized before.

And if you'll let me be heard, Your Honor, the plaintiffs say in their brief, and Your Honor is suggesting, that, quote, the disclosure of private information, bracket, to 100 people, closed bracket, is itself a brand-new privacy right.

That's just not right, Your Honor. There is no privacy right when the act is the negation of any expectation of privacy. I believe, Your Honor, it is not a close call.

Let me give you a hypothetical of my own. I go into a classroom and invite a hundred friends.

This courtroom. I invite a hundred friends, I rent out the courtroom, and I have a party. And I disclose --

THE COURT: These people are not all your friends.

MR. SNYDER: No.

And I disclose something private about myself to a hundred people, friends and colleagues.

Those friends then rent out a 100,000-person arena, and they rebroadcast those to 100,000 people.

I have no cause of action because by going to a hundred people and saying my private truths, I have negated any reasonable expectation of privacy, because the case law is clear. And I can cite --

THE COURT: If you disclose -- let me -- I agree with you that if you turned around right now in open court, on the record, and disclosed something about yourself, you would not have an expectation of privacy in that.

But what if you shared with your partners in your New York -- you're in the New York office?

MR. SNYDER: Yes, Your Honor.

THE COURT: What if you shared with your partners in your New York office some medical condition that you had?

MR. SNYDER: Absent any fiduciary or other legal duty, I would be out of luck. And let me tell you, Your Honor --

THE COURT: Wait a minute. So you say -- the partnership has an agreement. Okay? "You can share stuff with us and it won't be disclosed."

And so you share with a hundred people -- your hundred

partners in your New York office a serious medical condition that you have that's going to put you out of commission for a while, and then the Gibson Dunn office does a press release about it. Your privacy has not -- your privacy rights have not been invaded?

MR. SNYDER: It has not, Your Honor. And I know Your Honor is looking at me skeptically, but all you need to do is go to the common law. And I'll march through some cases, if Your Honor wishes.

But you have to, as a matter of law -- the Restatement, the annotations to the Restatement, the cases going back literally centuries, hold that you have to closely guard something in order to have a reasonable expectation of privacy. It's commonsensical.

This is why every parent says to their child, "Do not post it on Facebook if you don't want to read about it tomorrow morning in the school newspaper," or, as I tell my young associates if I were going to be giving them an orientation, "Do not put anything on social media that you don't want to read in the Law Journal in the morning."

There is no expectation of privacy when you go on a social media platform, the purpose of which, when you are set to friends, is to share and communicate things with a large group of people, a hundred people. And, of course, I want --

THE COURT: But there are different levels of risk you

take; right? I mean, you may -- when you disseminate information to your 20 friends or your 50 friends or your hundred friends, you're certainly taking a risk that other people will learn about that information. Just like when you tell a secret to your best friend, you're running the risk that your best friend is going to tell his wife about that, and his wife is going to tell her friend, and a larger circle of people will learn about it. But what you're not risking, a risk that you're not necessarily taking on is that the entity that's helping you disseminate that information to your friends will then turn around and disseminate it to a thousand different corporations.

MR. SNYDER: Your Honor, the hypothetical you gave -- which, of course, bears no resemblance to the facts of this case at all because of the disclosures that negated any reasonable expectation of privacy because users were told -- this is an asterisk to your hypothetical -- "We can't control what third parties do with your information. Your friends are going to share things with other people, including app developers, including others."

So put the disclosures aside. The disclosures are the icing on the cake in negating and vitiating any reasonable expectation of privacy. But even without disclosures, in your hypothetical, and certainly without consent as an issue, as a matter of black letter common law, the user no longer has any

expectation of privacy over information after she shares it with a hundred people.

Now, the reason is, Your Honor, because they shared the information -- this is what the case law, if you stretch it out, teaches -- you've lost control over the information and its subsequent disclosure, which is why, if you look at the congressional judgment behind the SCA, for example, it expressly authorizes the recipient of information with consent to share it with the world. And it's commonsensical.

So the case law --

THE COURT: Well, it doesn't expressly authorize the recipient of the information to share it with the world. It just says that if the recipient of the information shares it, it's not a violation of the SCA.

MR. SNYDER: Okay. Fair enough.

But my point, Your Honor, is that the SCA and the congressional judgment underlying it, reflects the commonsensical common law principle that if you don't hold something private, it's not private. And if you don't hold something private and publicize it to a hundred people, as a matter of law, you have no reasonable expectation of privacy.

In your hypothetical, do you have a breach of contract action against Facebook?

THE COURT: Oh, I would think so, yeah.

MR. SNYDER: Perhaps so under your hypothetical. But

let me give Your Honor a couple of cases.

THE COURT: Well, no. Let me ask you first. I think, for the most part -- the Complaint is riddled with these statements by Facebook executives with, sort of, grandiose statements about privacy and "Your privacy is important to us" and all that kind of stuff. I think, for the most part, those statements aren't terribly relevant. I mean, they may be a little bit relevant. They may be a little bit relevant to how the user understands the disclosure language. And we can get to that in a bit. But for the most part, I think that stuff is a little bit of a sideshow, except with respect to this question.

I mean, what you are saying now seems contrary to the message that Facebook itself disseminates about privacy.

MR. SNYDER: I would --

THE COURT: I mean, would Facebook -- I mean, if we were asking the CEO or whoever about -- if they were standing here instead of you, would they be saying the same thing?

That if Facebook promises not to disseminate anything that you send to your hundred friends and Facebook breaks that promise and disseminates your photographs to a thousand corporations, that that would not be a serious privacy invasion?

MR. SNYDER: First of all, I can't speak for the CEO, but I can speak for Facebook.

THE COURT: Okay.

MR. SNYDER: And what I can say to Your Honor is, first of all, I don't think any of the statements were grandiose. I think they're fully consistent with the robust and layered disclosures that Facebook makes to these users.

THE COURT: Facebook doesn't think that that is a serious privacy issue?

MR. SNYDER: Your hypothetical?

THE COURT: Yeah.

MR. SNYDER: I think it may be -- there's a difference between Facebook's statement, as the CEO has said repeatedly, about its commitment to privacy and what it wants to do above and beyond the law to respect privacy issues.

THE COURT: But my hypothetical is not --

MR. SNYDER: But it's not --

THE COURT: Facebook does not consider that to be a serious privacy breach?

MR. SNYDER: Facebook does not consider that to be actionable, as a matter of law under California law, because the very act of sharing with a hundred friends vitiates, as a matter of basic common law, any expectation of privacy.

Let me point Your Honor just to random cases that we found in response to Your Honor's order last night.

There's a Georgia case, Supreme Court case, *C-o-t-t-r-e-l-l versus Smith*, 299 Georgia 517, where an

extramarital affair was already exposed on blogs and to Facebook friends, so it wasn't a private fact. No tort; no privacy interest.

There are other cases involving --

THE COURT: Was it friends only? Because you just said "blogs."

MR. SNYDER: Facebook friends.

THE COURT: Yeah, but you just said "blogs."

MR. SNYDER: And --

THE COURT: So if it's out on the blogs --

MR. SNYDER: And Facebook.

THE COURT: -- for everybody to see, then that's a different story.

MR. SNYDER: And Facebook.

THE COURT: Right. But the whole point, I mean, Facebook's whole point, I thought, in sort of communicating to consumers how important privacy is, is that if you share stuff only with your friends, that doesn't mean you're sharing it with the world.

MR. SNYDER: No, Your Honor, Facebook never says that. Facebook says when you -- are we in your hypothetical, or are we in the real world? Because I'd like to go to the real world.

THE COURT: Okay. Let's go to the real world.

MR. SNYDER: In the real world, in the real world, not

only is it common sense and a matter of basic common law that when you share private information with a hundred people, you've lost any control over that information and its privacy; but the belt and suspenders on this case that negates any privacy interest as a matter of basic common sense, again, are the disclosures, because the disclosures here -- I made a board that is -- just sort of strips it down to its basics.

THE COURT: Great. And let me just pull up the actual document, because when -- this usually happens in patent cases where the lawyers pull out portions of a disclosure, and then I go to the full document -- so I always like to have the full document up when --

MR. SNYDER: That's fine, Your Honor.

THE COURT: -- a lawyer is showing me a poster board.

MR. SNYDER: My last board had the full document, and for the Court's convenience, I condensed it. So --

THE COURT: That's perfectly fine.

MR. LOESER: Your Honor, this is very apropos where we can't actually see.

THE COURT: Well, you're free to move around and go wherever you want.

MR. LOESER: Some judges get very angry when you walk --

THE COURT: No, no, no. Knock yourself out.

But let me just pull up the -- so this is Exhibit 45?

So this is Exhibit 45. This is the December 11th, 2012, Data Use Policy.

MR. SNYDER: Yes. And so this also --

THE COURT: And what page of that filing should I go to?

MR. SNYDER: Let me make the broader point, Your Honor, as my colleagues are looking for the page number.

So the broader point is that not only is it a matter of common sense and common law that when you disclose your private information to a hundred people, you have no privacy interest in that information, but here, the disclosures to Facebook were multiple and they said two things.

One, when you share information with friends, friends could share it with third parties, including apps. That's what happened here.

THE COURT: This is on page 10 of 16, right --

MR. SNYDER: Yes.

THE COURT: -- of the disclosure?

MR. SNYDER: Yes.

". . . information you share on Facebook can be reshared. This means that if you share something on Facebook, anyone" -- that goes to your question about scale -- "anyone who can see it" --

THE COURT: So one of the phrases that you took out -- that's not the beginning of the sentence. "Information you

share on Facebook can be reshared."

The beginning of the sentence is:

"Just like when you share information by e-mail or elsewhere on the web, information you share on Facebook can be reshared."

Right?

MR. SNYDER: It proves my point double, yes. I'm just trying to give the salient sentence, which says anyone can see it -- anyone who can see it, your hundred friends --

THE COURT: But when you share -- when you send an e-mail, when you share information by e-mail, you don't necessarily expect that the company that operates the e-mail system will take that information and disseminate it to a thousand other companies.

MR. SNYDER: The question is: Do you have an expectation of privacy in the information?

And in your hypothetical, when you send it to a hundred people, anyone who can see it -- the hundred people -- can share it with others, meaning, potentially, tens of thousands or more, including the games, applications, and websites they use. And that's this case, of course. And --

THE COURT: No, that's not this case because they haven't sued because their friends are resharing information.

MR. SNYDER: Well, it's the case that their information was shared with friends who shared it with Kogan;

and then Kogan, in violation of our policies, gave it to Cambridge Analytica and served back ads to the users.

Facebook, on a board I'm about to show you, made clear, as, again, is common sense, that once the sped arrow is launched, once your private information is shared with a hundred people, Facebook can't control what a third-party app or game might do with that information. And that, again, is common sense. And so --

THE COURT: But here's the thing. I know that we can't just focus on this language, and you have other language that is maybe a little more helpful to you.

But if we do look at this language in isolation, I would say that it's a little bit misleading, because what it -- the image that it invokes -- right? -- is, you post a message and you share that message with your friend or you send an e-mail to a friend or you make photographs available to a friend, and then your friend may turn around and forward it to somebody else. Right? But it doesn't really invoke the image of your friend playing FarmVille through Facebook and the act of your friend playing FarmVille through Facebook giving Zynga -- is that the name of the company?

MS. WEAVER: Yes.

THE COURT: -- giving Zynga access to all of your Facebook information that your friend could potentially see.

This paragraph that you've put up does not invoke that

image. It invokes a much more benign image of your information being passed along.

MR. SNYDER: Well, it depends on what you're talking about, if you're talking about apps, if you're talking about --

THE COURT: I'm talking about apps now.

MR. SNYDER: Apps. So I respectfully disagree, but I believe that this provides ample notice --

THE COURT: Okay. But --

MR. SNYDER: -- to users --

THE COURT: -- on a 12(b)(6) motion?

MR. SNYDER: Yes.

THE COURT: As a matter of law? I mean, that's another --

MR. SNYDER: Yes.

THE COURT: -- issue I'm struggling with.

You're saying that the only conclusion that a reasonable Facebook user could draw from this paragraph that you've called out now is that the user is going to understand that when their friend is playing FarmVille through Facebook, Zynga is going to be able to go in and grab all the information that is available to your friend from your Facebook account.

MR. SNYDER: Your Honor, it's not just this language. It is the multiplicity of disclosures, the layered disclosures, that plaintiffs paste throughout their Complaint that we cite to in our moving brief and reply brief.

THE COURT: I mean, so far, arguably, I mean, this is a little bit of a head fake. I mean, I'm not saying it was intentional, but you could -- it seems to me that you could view this paragraph as a little bit of a head fake.

MR. SNYDER: Well, if you look at "Controlling what is shared when the people you share with use applications," which is on Document 187-45, page 10 of 16, that disclosure says:

> "Just like when you share information by e-mail or elsewhere . . . ," dot-dot-dot.
>
> Then it says:
>
> "Your friends and other people you share information with often want to share your information with applications to make their experiences on those applications more personalized and social. For example, one of your friends might want to use a music application that allows them to see what their friends are listening to. To get the full benefit of that application, your friend would want to give the application her friend list -- which includes your User ID -- so the application knows which of her friends is also using it. Your friend might also want to share the music you," the user, "'like' on Facebook. If you have made that information public, then the application can access it just like anyone else. But if you've shared your likes with just your

friends, the application could ask your friend for permission to share them."

THE COURT: Okay. So that's a good counterpoint to what I said, but -- so that's sort of the Spotify example; right?

MR. SNYDER: Yes.

THE COURT: And then, if you go down to the last sentence in that section of the disclosures, it says:

"If an application asks permission from someone else to access your information, the application will be allowed to use that information only in connection with the person that gave the permission and no one else."

So it seems to me one way to interpret that is: All right. So we're talking about Spotify now. So your friend goes on Spotify, and Spotify wants to point out to your friend what their friends are listening to. So Spotify might want to tell your friend what you are listening to or what music you like, what music you've said that you liked on Facebook, or something like that. Right?

MR. SNYDER: Correct.

THE COURT: So in connection with that interaction between Spotify and your friend, Spotify may have access to your information and may point that out -- may point that information out to your friend.

But it doesn't follow, it seems to me, automatically, that this means that Spotify will also have access to your information outside the context of its interactions with your friends. And so that gets to the question that I asked you. I can't remember what --

MR. SNYDER: Question 5, Your Honor.

THE COURT: -- number it was.

Yeah, Question 5.

MR. SNYDER: So the answer to Question 5 -- and I appreciate the questions because we can answer them directly, "yes" or "no" or "maybe."

And in this case, the answer is, the words "only be allowed" do not describe, as a matter of law, on a 12(b)(6) motion, a technological limitation on what Spotify --

THE COURT: I don't think it -- I don't think, as a matter of law, that we have to interpret it that way.

MR. SNYDER: What I'm saying --

THE COURT: In other words, the plaintiffs aren't moving for judgment --

MR. SNYDER: I'm sorry.

THE COURT: -- on the pleadings --

MR. SNYDER: I misspoke.

THE COURT: -- here.

MR. SNYDER: No reasonable reading of this paragraph --

THE COURT: Why not?

MR. SNYDER: -- supports the notion --

THE COURT: Why?

MR. SNYDER: -- that "only be allowed" describes a technological limitation.

THE COURT: Why not?

MR. SNYDER: Well, I'll tell you. The plain and ordinary definition of "allowed," the word "allowed," is like "may" and "can."

"Allowed" is not "Is it physically feasible?" but what is permissible, acceptable, sanctioned. If you look at the Oxford English dictionary, "allowed" is --

THE COURT: No, I understand that. But I'm saying there's another sort of colloquial use of "allowed." Let me give you an example. Okay?

March Madness brackets. Okay? I don't know if your office does this, but many offices say to employees, "Look, you cannot use your work computer to fill out your March Madness brackets," for whatever reason, because we're uptight or because it creates a server problem or something like that.

MR. SNYDER: You can't use your office computer to go on Facebook. You're not allowed to.

THE COURT: Oh, another example.

MR. SNYDER: We don't like that rule, but it exists somewhere.

THE COURT: So there are two -- so you're not allowed to do that. There are two possible ways that could be implemented.

One is, we're going to trust you not to do it. And if we catch you doing it, you're going to be in trouble.

The other way is to just block the website.

And so I might be on my computer and I may want to go to my March Madness brackets, and up pops a message: You are not allowed to go to this website.

And so that's a technological barrier to my being able to access that information. And I don't understand why it's not at least plausible that a user could interpret that language that way.

MR. SNYDER: I'll explain why it's not reasonable nor plausible. Not only is it the plain, ordinary --

THE COURT: The question isn't: What's more plausible?

MR. SNYDER: No, Your Honor. What I'm saying is, it is an unreasonable, implausible reading, as a matter of law, to read it the way Your Honor suggested.

THE COURT: Why?

MR. SNYDER: I'm about to explain.

First is, when you look to the canons of construction, which is what we need to do in discerning the plain language, if it is plain, is first you look to the dictionary definition.

And there's no question that every dictionary definition, whether it's Merriam-Webster, Oxford English, does not make the colloquial point Your Honor is making -- let me start with that -- but makes clear that the word "allow" means --

THE COURT: Well, but do you disagree --

MR. SNYDER: -- permission.

THE COURT: -- that people use the word "allow" that way?

MR. SNYDER: But the second canon of construction which is applicable here and dispositive in support of what I'm saying is that when Facebook -- the canon of construction is that in trying to discern words of a contract, you don't just look at the word at issue, but you look at the word in the context of the integrated agreement.

The integrated agreement makes clear that when Facebook wanted in its disclosures to refer to technical limitations, it did not use what you say is a colloquial "allow."

THE COURT: Okay. Show me that.

MR. SNYDER: It used words that are descriptive and accurate to technological restraint or disability.

So the Data Use Policy --

THE COURT: Same document?

MR. SNYDER: -- November 15th, 2013, page 10 --

THE COURT: Okay. Hold on. Let me get there.

All right. Go ahead.

MR. SNYDER: "Once you remove an app, it won't be able to" --

THE COURT: Wait. Hold on. Let me find the language that you're reading. Can you tell me where on --

MR. SNYDER: Yeah. Page 10.

THE COURT: -- where on the page you are?

MR. SNYDER: Yeah. It is --

THE COURT: Oh, I found it.

MR. SNYDER: -- the third paragraph.

THE COURT: I found it.

MR. SNYDER: -- "it won't be able to continue to update the additional information you've given them permission to access . . . ." Dot-dot-dot.

If you look at that same page -- where is that, Chris? -- it says:

"You always can remove apps you've installed by using your apps settings . . . ."

And then it gives a --

THE COURT: You said the next page? Sorry.

MR. SNYDER: I'm sorry. Same page. Page 10.

THE COURT: Okay.

MR. SNYDER: Let me see where that is.

Yeah, it's the bottom of the third paragraph, the last sentence.

THE COURT: Okay. Bottom --

MR. SNYDER: And then it says:

"But remember, apps may still be able to access your information . . . ."

And so when Facebook wanted to refer to scope of permission to use data, they refer to it as, in the referenced language, "allowed." When they wanted to refer to a physical constraint or limitation, they used --

THE COURT: "Able."

MR. SNYDER: -- "able to," "be able to."

And then other language in the Data Use Policy further discloses that Facebook "cannot physically," cannot physically or technologically limit how apps -- Kogan, in this case -- use data once they've obtained it.

THE COURT: Where's that?

MR. SNYDER: Page 9 of the same policy.

THE COURT: Okay.

MR. SNYDER: And that's the board -- that's the second board that is -- I don't need the board. Let me just --

And there they say:

"Remember that these games, applications and websites are created and maintained by other businesses and developers" --

THE COURT: Wait. Hold on. I want to find the language that you're reading.

MR. SNYDER: And I apologize, Judge.

THE COURT: That's okay. I found it.

MR. SNYDER: "Remember that these games, applications and websites" --

THE COURT: Wait. Hold on. Give me one sec. I just want to read the paragraph --

MR. SNYDER: Yeah.

THE COURT: -- that precedes it.

Okay. Go ahead.

MR. SNYDER: And this language, Your Honor, again, goes to any reasonable expectation of privacy.

THE COURT: "Remember that these games, applications and websites are created and maintained by other businesses and developers who are not part of, or controlled by, Facebook, so you should always make sure to read their terms of service and privacy policies to understand how they treat your data."

MR. SNYDER: Right.

THE COURT: But this doesn't speak to the issue that we were just talking about, because this is telling me about my own interaction with apps on the Facebook platform.

MR. SNYDER: Right. Precisely.

THE COURT: But this is an issue about my friends being able to share my information with the app.

MR. SNYDER: Precisely. And that's why these layered disclosures, in combination, are so effective and robust.

You're told a number --

THE COURT: Effective from the standpoint of?

MR. SNYDER: User disclosure and user understanding.

Smith v. Facebook looks at these exact same terms in the cookies context, and the Ninth Circuit said there is no claim because these disclosures are sufficient.

The district court in that case, the district court in that case, in a decision, a written decision, held, as a matter of law, there is no privacy claim here because these disclosures put the folks on notice that this was going to happen.

And so here what you have, Your Honor, are multiple layered disclosures.

The first disclosure is: What do you share on Facebook?

THE COURT: Since you bring up the *Smith* case, it seems like courts often just say -- just go straight to the question it was disclosed or it was not disclosed, and they don't really pay attention to what the test should be, depending on which stage of the litigation you're at.

And that sort of gets to this other question that I had that I asked you. I mean, is it -- we're at the 12(b)(6) stage. So I would think that you would have to -- the question is: What would a reasonable Facebook user interpret this to mean?

MR. SNYDER: Yes.

THE COURT: Do you agree with that?

MR. SNYDER: Yes. It's an objective test. Courts --

THE COURT: And then I would think that you could only win at the 12(b)(6) stage if your interpretation is the only plausible interpretation. Do you agree with that?

MR. SNYDER: I agree that if my interpretation -- you could say it both ways. If my interpretation is the only plausible, or the defendant's interpretation is unreasonable or implausible.

And we believe this case is ripe for 12(b)(6) dismissal because, as in ***Smith v. Facebook***, an ordinary, reasonable user in an objective test would understand these layered disclosures, which are robust and blunt, to mean, one, when I share with a hundred friends, my hundred friends may share with apps; two, we don't control what those apps, Kogan, may or may not do.

And Cambridge Analytica demonstrates that in a dramatic way; that in the end, we can't control Kogan. We can only contract with him and hope that he honors his obligations to us.

So if you're concerned, user, about what your friends might be doing with apps or if you're concerned about what apps might be doing with your data, you have multiple options.

Option 1, you can control, in a granular sense, your privacy settings. You have control over your information.

THE COURT: Well, privacy settings don't help.

MR. SNYDER: Privacy settings do help. You can -- and that's the next disclosure. You can control most of the information other people share with applications.

And then in another disclosure --

THE COURT: But that's not privacy settings. That's app settings.

MR. SNYDER: The notion that Facebook was hiding anything, we think, is preposterous, because in multiple places on multiple pages, repeatedly and clearly Facebook is saying: If you share something with your friends, they might share it with their apps; and if you're concerned about what the apps are doing with your information, check their policies.

This is from the plaintiffs' own Complaint, paragraph 599:

> "Facebook told users that by using their App settings, they could prevent an App from accessing their data via a Friend that used the App. This was true at all relevant times."

There was no coercion. There was no surprise. There was full disclosure.

THE COURT: It was true that Facebook told them at all relevant times.

MR. SNYDER: Yes.

THE COURT: Not that it was the case, I think is what they're saying.

MR. SNYDER: Right. My point, though, is that having been told "There is no expectation of privacy," you can't cry foul that there's gambling going on in this establishment when you've been warned.

Second, 593 of the Complaint:

> "At all relevant times, the SRR told users, 'You own all of the content and information you post on Facebook, and you can control how it is shared through your privacy [hyperlinked] and application [hyperlinked] settings.'"

So if you are a user concerned about your friends taking your data and information and sharing it with Spotify, and who knows what Spotify will do because you've been told Facebook does not control Spotify, we have given you a user-friendly mechanism for protecting that.

It goes on, on 594:

> "The Data Policy . . . discussed in more detail," below, I guess, "[told] . . . users" -- "discussed in more detail" -- oh -- "how users could use the Privacy . . . and App Settings to control whether and how other users or other entities could access one's own content and information."

Unless we treat Facebook users as imbeciles, which the law does not, a reasonable user, which is the standard in this district, as a matter of law, renders implausible the notion or

argument that these disclosures were either misleading or insufficient.

The privacy settings, which are clearly disclosed and accessible to users -- not buried in the fine print on the bottom of an airline ticket or the bottom of a cruise line disclaimer, but prominent, accessible, hyperlinked -- control which friends can see your info. That is dispositive here.

THE COURT: You say we don't treat them as imbeciles, and, of course, I agree with that. But it does raise another question in my mind, which is, I assume that when we're applying the "reasonable Facebook user" test, we are kind of going back in time; right? We're imagining the reasonable Facebook user in 2012 when they signed up for Facebook. Would you agree with that?

MR. SNYDER: At the time the alleged -- I would say at the time the alleged misconduct or privacy breach occurred because --

THE COURT: Why wouldn't it be at the time that they --

MR. SNYDER: Because you're bound by --

THE COURT: Okay. We'll get to that in a second.

MR. SNYDER: That's the incorporated by reference.

THE COURT: So it's sort of hard, because I guess what I would say is that: Okay. I know about the Cambridge Analytica scandal. I read all the news articles or some of the

news articles when the scandal broke. And then I, of course, started paying more attention and learning more once I got assigned this case. And I've spent a tremendous amount of time studying the disclosures and reading the words of the disclosures in the context of what has happened -- right? -- in the context of Kogan getting this information and disseminating it to Cambridge Analytica, in the context of the excellent briefs that both sides have filed. Right? And so when I drill down and I spend the probably hundreds of hours that I've spent looking at this issue, I can read this language and I can figure it out.

And I think your interpretation probably is the best interpretation -- right? -- for an extremely well-informed person who is trying to figure out what this language discloses.

But if I go back in time to 2012 or whenever somebody signed up for Facebook and nobody had even heard of Cambridge Analytica, and this concept of a friend sharing information with an app was much more abstract, would a reasonable user be able to go through these layers of disclosures as you've described them?

You seem to think that word helps. I'm not sure -- I think it's actually sort of counterproductive to your argument.

But would a reasonable Facebook user at the time, not an

extraordinarily well-informed Facebook user who's familiar with Cambridge Analytica, but a reasonable Facebook user at the time be able to go through all these layers of disclosures and figure out that if they send stuff to their friends, that it will inevitably result in the dissemination of all their information to hundreds, if not thousands, of corporations unless they go in and they change their app settings?

MR. SNYDER: Your Honor, I respectfully but forcefully reject the premise of the question. You don't need to go back in time. There's no Cambridge Analytica moment that changes the canons of construction or the contract interpretation. There's no drill-down needed. There's no hundreds of hours needed. There's no well-informed person standard.

There is an objective reasonable user standard, and that is governed by contract interpretation. And in the *Yahoo* case, this district held whether the terms of service adequately notified the reasonable platform user, that's the standard. And you can discern what the intention of the parties is from the writing here in only one way.

THE COURT: And this is what I struggle with. Even if I agree that your interpretation is the best interpretation after staring at it for a long time and thinking about it and reading your briefs, we're talking about a reasonable user; we're talking about a 12(b)(6) motion. And am I really in a position, at this point, to conclude from all these words that

the Facebook user who signs up in 2012 could only interpret this language in the way that you're suggesting?

MR. SNYDER: Well, the answer is -- the answer is yes, there is only one reasonable reading of this language.

And let me tell you again, the three sources of truth in the disclosures that are dispositive, as a matter of law under 12(b)(6), that there's only one reasonable reading.

The privacy settings control which friends can see your information. So you can -- if you really want to be private, there are people who have archival Facebook pages that are like their own private mausoleum. It's only set to me, and it's for the purpose of repository, you know, of your private information, and no one will ever see that.

THE COURT: That's so strange. I'm curious. Do you know how many -- like, what percentage of Facebook users --

MR. SNYDER: I don't, but it's more common than you think, because people like the user interface; they like the functionality. And it's --

THE COURT: One thing I could imagine is, whether it's an individual or a business, starting off with the settings private while they set up their --

MR. SNYDER: Correct.

THE COURT: -- Facebook page --

MR. SNYDER: Correct.

THE COURT: -- and then they go live with it.

MR. SNYDER: So the privacy settings control which friends can see your information.

Once you go to friends, the gig is over because you've just gone -- taken a hundred people and pronounced your personal likes and dislikes. In fact, the very act of liking something and showing your friends that you like something is a non-private act. It's the whole premise of Facebook and social media, is to render not private your likes, your dislikes, your expressions. When I tag someone in a photo, it's to tell people, not keep private, that I'm sitting on a park bench with John Smith. So it's the opposite of private when you do that.

But second, the app settings then control whether friends can share your data with apps. So that's the second point where you can say, "No, this is private. I want to have privacy rights in this information."

But you're told if you don't change your app settings, friends can take your data and tell Spotify what music you like. If that's not enough, Facebook gives belt and suspenders, and the data policy says, "We can't control what these apps do with your information, so be careful; read their terms of service."

And, Your Honor, there is no need to spend hundreds of hours with those paragraphs. The Courts rule repeatedly, whether it's the *Yahoo* case, the *Perkins* case in Google, the *Smith* case in Facebook, that where, as here, terms of service

and privacy policies are reduced to writing, it is appropriate, as a matter of contract interpretation, as a matter of law, to read them reasonably and not read them unreasonably.

It would be unreasonable to read these provisions --

THE COURT: Unreasonably.

MR. SNYDER: -- unreasonably.

Let me say one more point on that. I say layered disclosures. The reason I say that, it sounds good, but also, Facebook took pains to make sure that it told its users, in multiple places that they might look, how to control friend sharing. It wasn't just in one place so that if a user elides over it, they may miss the action.

If Facebook intended, as counsel suggested when I had the board blocking them, that Facebook was trying to hide something, there's a very easy way to deep-six these disclosures. Facebook did the opposite, put it on multiple touch points, data policy, app settings, privacy settings.

And what's telling about the Complaint is -- which does take a hundred hours to read. In paragraph 408, this is an admission that is binding on the plaintiffs and, again, dispositive of Facebook's argument that there is no reasonable expectation of privacy here.

"In order to gain access to non-public content and information, App Developers needed to request permission from the App User. Through this process,

App Developers gained access to the App User's content and information and the user's Friends' content and information."

In other words, this is the paragraph 121 and 122 from their original Complaint that they struck in this Complaint, which acknowledged -- and I think it was fatal, which is why it came out of the Complaint -- that no app developer, Kogan or other app developer, obtained information in excess of or in contravention of any Facebook user's privacy settings.

This is not a case where people go on Facebook and they're blindsided because friends are getting their data and sharing it with apps. This is a case where what happened up until Kogan was exactly, exactly what was advertised.

And, of course, Facebook users have another choice if they don't like the platform. And ultimately, that's what this case is, Your Honor. If you read the Complaint and spend the hundred -- because it's 200 hours to read it twice -- what you realize is this is really just a broadside against Facebook. And I'm not going to argue right now. I'm going to beg you for five minutes at the end to argue standing. But this is why the Complaint is really a Complaint about ubiquitous sharing on social media platforms.

They don't like it because when you go on a social media platform and share your information with a hundred people, you've lost control. And that creates anxiety, and that

creates concern. It doesn't give rise to a claim, which is why we say, in the raging debate that's going on in this country about what does privacy mean in the digital age, we're only about five years or six years into the digital age in the sense that apps were not widely adopted until maybe 2014, 2013, 2015. So we're less than half --

THE COURT: Yeah, I think that really cuts against you, because it speaks to what a reasonable Facebook user would understand when they're reading these disclosures in 2012.

MR. SNYDER: No, Your Honor.

THE COURT: That's my whole point --

MR. SNYDER: No.

THE COURT: -- is that the concept of an app and the interaction between your friend and an app is so much more abstract to the 2012 reader pre-Cambridge Analytica than it is now.

MR. SNYDER: Facebook told users what would happen clearly, bluntly, repeatedly, and it happened.

The point I was making is that to the extent that these plaintiffs or similarly situated people feel aggrieved by how the Internet has developed and how information sharing on the Internet has revolutionized human civilization, because people are now sharing things in a digital realm that they never did before, that's not for the federal district courts to invent new privacy rights.

And it's why -- it's why -- it's why, Your Honor, you have Congress debating these issues, why you have the FTC investigating these issues. But that does not mean in this case, on these facts, given the allegations, that this case can or should proceed because there is no common law tort or tort analogue that fits these facts.

THE COURT: Do you want to talk a little bit about business partners?

MR. SNYDER: Yes.

THE COURT: They label these companies as "business partners." I don't know -- I can't remember where they got that from. Maybe they got that from *The New York Times* article or something.

MR. SNYDER: Yeah.

THE COURT: You label them as "device manufacturers."

MR. SNYDER: Um-hmm.

THE COURT: It's not clear to me where you get that. I mean, it seems like you're rewriting their Complaint when you describe them as "device manufacturers."

MR. SNYDER: So let me explain that. And thank you for asking for that clarification.

This may be the most cynical of their arguments and, also, the one that demonstrates the point I just made, which is that the Complaint here is how Facebook operates, not that there is an actionable conduct. Let me explain why.

First, you have to -- the Complaint conflates -- and maybe we fell into the trap. I don't think we did -- device manufacturers with so-called whitelisted apps and other apps. So if you break down the players into four categories, you have Kogan and Cambridge Analytica. That's the Cambridge Analytica parties. You have other apps, Spotify. You have the so-called whitelisted apps, which are the so-called --

THE COURT: Yeah, I know. I'm just asking you, how did you come up with "device manufacturers" to describe what they call "business partners"?

MR. SNYDER: Because originally, they were --

THE COURT: Because they had a list of business partners.

MR. SNYDER: They do. They do.

THE COURT: And they don't seem like device manufacturers.

MR. SNYDER: Some of them are; some of them aren't.

THE COURT: Okay.

MR. SNYDER: Let me break them up into their constituent categories. And page -- thanks, Josh. Paragraph 483 of the Complaint is what we're going to respond to now, as well as Your Honor's Question 6. And it's alleged:

> "Facebook partnered with a diverse set of companies, including Business Partners, to develop and integrate Facebook's User Platform on multiple devices

and operating systems."

And so on and so forth.

And so let me address why that business partner allegation does not get to first base under 12(b)(6).

First and critically, as to the *Clapper* requirement of particularity, the Complaint, again, suffers fatally from the absence of any allegation, among the thousands of allegations in the Complaint, that any plaintiff's information was shared with any of these business partners.

THE COURT: Well, I mean, I don't know. I mean, let's say we're just limiting ourselves to these 53 business partners. If I'm on Facebook and these business partners have access to my data based on my interaction with them or based on my friends' interaction with them, it's a virtual certainty that at least one, and likely many more, of these business partners will have my data.

MR. SNYDER: I respectfully disagree. And I also, again, respectfully disagree with the premise that "virtual certainty" is the standard. Under *Clapper* and *Lujan*, L-u-j-a-n, this is precisely the kind of non-particularized speculation, and the *Lujan* case made clear -- that was the *Wildlife* case where --

THE COURT: I know the case.

MR. SNYDER: Yeah.

And so there is no "reasonable likelihood" or "virtually

certain" test. There's a duty to investigate, and these plaintiffs are required -- this is my first point. There are many other points. But the first point, they're required to allege, plausibly, that any of these so-called business partners received their data. They didn't. That is a pleading failure. You can't just assume that they accessed Facebook on a BlackBerry during that stump period between when Facebook launched and apps were developed. And that's when the BlackBerries of the world and the Apples of the world built Facebook-like environments then.

THE COURT: Okay.

MR. SNYDER: Okay.

THE COURT: I understand that argument.

And then your second argument is that this, too, was disclosed.

MR. SNYDER: Yeah. So, yes. As to all categories, the disclosures were more than sufficient. And I think I have a board for that one too.

And this really, Your Honor, is not only commonsensical -- before we get to the language -- it really is no good deed goes unpunished. I remember, because I was an early adopter of Facebook in 2007, being excited that I could actually go on my BlackBerry and access my Facebook information on my BlackBerry. It was exciting because, before that, you had the flip phones and maybe you could text on a flip phone. So now I had my

BlackBerry.

And BlackBerry built this really kind of protoskeletal Facebook-like environment so that I could access my Facebook data on my BlackBerry.

As a BlackBerry user and a Facebook user, heretofore only using Facebook on my desktop, how do I think my information got from Facebook to BlackBerry?

THE COURT: Well, I think this is why you have changed the name of "business partners" to "device manufacturers."

MR. SNYDER: No, I haven't.

THE COURT: And it's why you're using BlackBerry as an example.

MR. SNYDER: No.

THE COURT: Because I actually think you have a -- to the extent that they are complaining that information was shared with device manufacturers, I think they have a pretty weak argument there.

MR. SNYDER: Well, I'm not --

THE COURT: And so I'm not as concerned with the device manufacturers.

MR. SNYDER: Let me get to the others, then.

I'm not changing any names, Your Honor, respectfully. Paragraph 486 of the Complaint -- thank you, Josh -- says:

"Facebook formed Business Partnerships as early as 2007. These deals allowed Facebook to expand its

reach by outsourcing to Business Partners the time, labor and money required to build Facebook's Platform on different devices and operating systems."

So my understanding is that the gravamen of that allegation is device manufacturers. But then elsewhere in the Complaint, they talk about whitelisted apps and other apps.

THE COURT: Let's assume that the Complaint makes pretty clear that business partners are not limited to device manufacturers.

MR. SNYDER: So let's go to other apps and so-called whitelisted apps. Those are the other categories other than device manufacturers.

THE COURT: No. Let's stick with business partners --

MR. SNYDER: But --

THE COURT: -- which consists of a universe of companies that is greater than device manufacturers.

MR. SNYDER: Well, I can list them, Your Honor, because I have a list of them in front of me, and they are -- they fall into two categories: other apps or so-called whitelisted apps. And those are the only two other categories in the Complaint, other than device manufacturers and Kogan, at issue.

And as to those categories of so-called business partners, from the user perspective, all apps are the same. Users are told, as we've marched through over the past half an hour or 45

minutes, that their friends could share their information with apps. It didn't say with public apps or private apps or big apps or small apps.

THE COURT: But I don't think the allegation about business partners is that the business partners got Facebook users' information through friends. If I'm misunderstanding, you can correct me, but I don't think that's the allegation relating to business partners.

I think the allegation relating to business partners is that Facebook simply gave business partners access to this data.

MR. SNYDER: I don't think so, Your Honor. My understanding of the allegation is that they either gave it to device manufacturers to facilitate a Facebook-like experience on these other operating systems, one; or, two, that these companies obtained Facebook user information, the so-called business partners, as a result of friend sharing.

THE COURT: Interaction with friends?

MR. SNYDER: Friend sharing.

THE COURT: Where does it say that? I mean, where does it say that in the Complaint? I interpreted the Complaint to mean: Okay, we've got the app problem here where apps are getting information about you through your friends without your knowledge; and then we've got this separate problem with business partners where Facebook was just giving data to these

business partners willy-nilly.

And some of them are device manufacturers. And we can kind of understand why device manufacturers needed to get data. But we have these other companies and --

MR. SNYDER: If you look at the allegation, 563, Apple had access to the contact numbers.

THE COURT: Wait. Hold on. Let me go to 563.

MR. SNYDER: If you look at all of the partners, because I have them all broken down here on my outline, in each instance, it was to either facilitate use on an operating system or the ability to read -- there's an allegation, 557:

Up to 2017, Yahoo had access to users' news feeds, including posts and users friends, for 100,000 users per month -- I guess that's what Your Honor is referring to -- for a feature that Yahoo had discontinued in 2012.

But that was with user permission, Your Honor. They're apps. And so that's my point here. My point is that as to all categories, whether it's these private companies or public apps or otherwise, users are told that their information will be shared with third parties for purposes of targeting advertising back to the users, which the plaintiffs acknowledge the targeting of advertising is neither actionable or unlawful in any way.

And so it's hard to discern, again, I guess --

THE COURT: I mean, I admit the allegations are a

little fuzzier here than they are in the third-party app context.

MR. SNYDER: This is the problem with the Complaint, Your Honor. What happened is, they took every newspaper article and they just reprinted what they saw, without conducting a reasonable enough investigation to back any of it up as to this.

And there's no claim here, Your Honor, that there is a data breach. There's no claim here that there is any use by any of these so-called business partners in excess of or in contravention of user settings.

And so despite having so many at bats here, the most they can come up with on this business partner claim is an allegation that they don't like that these big companies got their data.

Well, they had the ability, Your Honor, to restrict what information was shared or not shared on the privacy settings that we went through a little earlier. So this is not, again, forced or coerced sharing. This is sharing with the consent and knowledge of users.

And so this is -- this stands in no different camp or no different analytical framework than any third-party app. And the question is: Is there a reasonable expectation of privacy where users were told that business partners, so-called, which are just another category of apps, would get their information?

Again, Your Honor, what we're talking about here is a complaint about information sharing on Facebook. The plaintiffs don't like it, and it's their right not to like it, but there is no common law tort, common law analogue, statute of Congress that makes it illegal for a social media company to share information that users voluntarily share with friends in circumstances where they were told, in clear and no uncertain terms, that once you share your information, you lose control of it and, even more, Facebook can't control what third parties do with it.

So not only is there no serious invasion of privacy, there's no invasion of privacy at all, which, of course, brings us full circle to the taboo topic, which I'm not going to get to, which is Article III.

THE COURT: The other question that we haven't given you a chance to address yet -- I think you've addressed everything that I put out there except for this last issue, which is changing the terms of service after somebody agrees to it.

And mainly, I guess what I want from you -- if you want -- I'm happy for you to argue it, if you want; but mainly, I want to make sure I'm just not missing any cases that you think are favorable to you --

MR. SNYDER: Yes, Your Honor.

THE COURT: -- at this point.

MR. SNYDER: And I appreciated the question because I think there is some misunderstanding, not in this Court, but in general in the jurisprudence because of some of these old cases that are hard to follow.

And I think this is a really easy, easy question. So the answer is, there is clear incorporation by reference. You don't have to say "incorporated by reference" under the case law. And the best cases showing that the Data Use Policy, sometimes called the privacy policy, was incorporated by reference into the SRR --

THE COURT: No. I was actually asking --

MR. SNYDER: Oh.

THE COURT: -- the change -- I was more interested in hearing from the plaintiffs on that question --

MR. SNYDER: Got it.

THE COURT: -- because I think they're a little bit behind the eightball on that issue.

MR. SNYDER: Yes.

THE COURT: But I think you are probably behind the eightball on the issue of changing the terms of service after users signed up.

MR. SNYDER: Aah.

THE COURT: And so I wanted to --

MR. SNYDER: Yes.

THE COURT: And as I said, I'm happy to hear you argue

that a little bit --

MR. SNYDER: Yes.

THE COURT: -- but mainly, I want to make sure I'm not missing any of the cases on that.

MR. SNYDER: Okay.

THE COURT: I know there were a couple of cases from San Jose on that. I think there was a Judge Koh decision and a Judge Grewal decision on that that are somewhat favorable to you.

MR. SNYDER: There are good Ninth Circuit cases too, Your Honor.

THE COURT: There's a Donato decision that is distinguishable but, I suppose, partly helps you; partly helps the plaintiffs.

What else -- there was one other case I think I read on this. But I just want to make sure I'm not missing any cases.

MR. SNYDER: There's actually a plethora of cases.

THE COURT: Okay.

MR. SNYDER: We can send them to Your Honor, or I can put them into the record. But --

THE COURT: Go ahead and tell me what other cases support you on this.

MR. SNYDER: There are two principles. There are two operative, dispositive principles here.

The first is, users are bound, under California law, by

updated user agreements where the company, as here, updates its agreements on the platform, where, as here, there is a so-called unilateral modification clause which exists here.

Tompkins versus 23andMe, Ninth Circuit case from 2016, 840 F.3d 1016. There, the Court held that the modification -- unilateral modification clause is enforceable in California when -- and the Ninth Circuit didn't condition its holding on any sort of notice requirement.

THE COURT: I have that in my stack, but I haven't --

MR. SNYDER: That was a --

THE COURT: I haven't read that yet.

MR. SNYDER: That was a motion to dis- -- that was decided on the pleadings.

THE COURT: Okay.

MR. SNYDER: *Ali*, A-l-i, *versus JPMorgan Chase*, Ninth Circuit 2016*; Procurium*, holding the same. Not unconscionable, fully enforceable. Again, no notice requirement. And, again, the issue was decided on the pleadings.

Then the second, several district courts have, as Your Honor noted, held that continued use after posting of new terms constitutes assent. It's the *Facebook versus Profile Tech* case, Judge Grewal, 2013.

There is a *Google* case from 2016, Judge Koh decided, September 23, 2016, *M-a-t-e-r-a v. Google*. And same holding.

And then there is the *DeVries* case, I think Your Honor

mentioned, from 2017 which holds:

"In general, courts have enforced new terms where prior agreements included change-in-terms provisions."

There's the *Campos* case, another Northern District case from 2019, Judge Corley:

"Plaintiff has not shown that the [unilateral modification] provision is subsequently unconscionable, especially given that the arbitration agreement that applies to plaintiff's dispute is the agreement she expressly agreed to."

There's a *West versus Uber* case, Judge Gutierrez, 2018, citing *Biometric*, which I'll get to in a minute, and find that the plaintiffs assented to unilaterally modified terms when they continued using Uber for a year after receiving notice of the changes in terms.

THE COURT: And then *Biometric* was Judge Donato's case; right?

MR. SNYDER: Yeah.

THE COURT: Yeah.

MR. SNYDER: And then --

THE COURT: That was the one where they sent -- Facebook sent e-mails to --

MR. SNYDER: Yes.

THE COURT: And maybe that happened here too.

MR. SNYDER: Yes.

THE COURT: We're going on the Complaint right now --

MR. SNYDER: Well, yeah.

THE COURT: -- which doesn't contemplate --

MR. SNYDER: The truth is that Facebook did more than merely post the revised contract on its website. It gave users notice in a variety of ways.

THE COURT: But we have to assume that it didn't for purposes of this motion; right?

MR. SNYDER: Well, you know, I think that in, again, the Donato case, Facebook users agreed, you know; and so --

THE COURT: But that was, like, after -- that wasn't just a summary -- that wasn't a motion to dismiss. I don't think it was even summary judgment. Right? It was after an evidentiary hearing.

MR. SNYDER: We don't need to -- the fact is, just so Your Honor could be comfortable knowing that Facebook wasn't trying to get one over, we did go beyond what the law required, which, again, is an example of how the Complaint is not only overblown --

THE COURT: So let's talk about what the law requires, then. I mean, I guess what I -- it does seem that there are cases going in both directions on this issue and the courts are sort of all over the map.

But I guess what I'm having trouble wrapping my head around is, your argument seems to stand for the following

proposition. All right? Facebook has terms of service which say -- let's say I sign up in 2012, and the terms of service say you can share information with your friends and under no circumstances will we, Facebook, permit the disseminat- -- allow the dissemination of that information to anybody else. Your friends might do it. We can't prevent your friends from doing it. But we will not provide that information to anybody else. We will not give access to that information to anybody else under any circumstance.

And I sign up for that. And then a year later, Facebook changes the terms of service and says: We have the right to disseminate all the information you make available to your friends to anybody we like for any reason under any circumstances. And ten minutes later, Facebook disseminates all of my information to a thousand companies.

Your position, it seems to me, stands for the proposition that that's perfectly okay --

MR. SNYDER: I would say --

THE COURT: -- from a legal standpoint.

MR. SNYDER: No, Your Honor, because I neglected to say and was about to say -- and then Josh reminded me to say -- all of this is subject to the covenant of good faith and fair dealing. So you can't act in bad faith and you can't deal unfairly.

But as a matter of contract interpretation and

enforcement, you have a remedy. If you don't --

THE COURT: You can't invoke the covenant of good faith and fair dealing where you do something that is directly authorized by the contract.

MR. SNYDER: Well --

THE COURT: And so if you are -- if the contract explicitly says that Facebook has the right to change the terms of service any time it wants without you agreeing to it, then I don't think there could be a breach of covenant of good faith and fair dealing claim because Facebook is doing what is explicitly authorized by the contract.

MR. SNYDER: I would say, I have not studied that issue because it's not implicated here. But I will say that every case to consider this issue has held that, under certain circumstances, there could be an implied covenant of good faith and fair dealing claim.

But let me make two other points, because your hypotheticals are challenging but, thankfully, are not this case.

And so the terms here did not change in such a dramatic fashion. They're minor changes. But more important than that, what the cases say, each of them -- or many of them, at least -- is that the plaintiff has a remedy if they don't like this contract, if they don't like this bargain which says Facebook can change its terms of use from time to time. They

have two remedies. They can review them from time to time to see how they've changed, "or," or they can discontinue using the service if they don't like the rules of the road.

And, of course, that, ultimately, is another fatal problem.

THE COURT: So if I'm using Facebook, I need to -- every day I need to go check to see if my terms of service have changed?

MR. SNYDER: Actually not, because as the plaintiffs know -- and I believe the Court could take judicial notice under Rule 12(b)(6) -- Facebook announces any major changes prominently, repeatedly, in press releases, on its website, often e-mails. I mean, in the Donato case, often e-mails, e-mails to users.

And California courts --

THE COURT: But what you're asking me to rule is that if I sign up for Facebook, it's my obligation to read the terms of service every day --

MR. SNYDER: That's not --

THE COURT: -- to make sure that they haven't changed.

MR. SNYDER: That's not what I said, Your Honor. What I said is that you're bound by the contract, and the contract --

THE COURT: Which says that we can change our terms of service --

MR. SNYDER: Yes.

THE COURT: -- any time we want.

MR. SNYDER: Yes, Your Honor. That's the contract. And if you don't like a contract, you don't have to sign it. They have a remedy. They could discontinue service.

THE COURT: The problem is, I haven't yet agreed to the new terms of service because I don't know what they are.

MR. SNYDER: You don't have to. Every case to consider this that I've seen --

THE COURT: That's not correct. There are cases going both ways on this.

MR. SNYDER: Well, okay. Well, I'm not aware of either a controlling Ninth Circuit case --

THE COURT: For example, Judge Tigar's *Safeway* case.

MR. SNYDER: Okay. So whether there's an outlier case or not, the weight of authority, the substantial weight of authority, including from the Ninth Circuit in the Tompkins case -- and I haven't gotten to the California Supreme Court cases -- hold --

THE COURT: We'll get to those because this is a question of California law.

MR. SNYDER: Right.

THE COURT: Tell me about the California Supreme Court cases.

MR. SNYDER: The California --

THE COURT: I would be bound by those cases; right?

MR. SNYDER: Well, the California cases all support Facebook.

THE COURT: Okay. What are they?

MR. SNYDER: There's *Casas*, C-a-s-a-s, which is a 2014 intermediate appellate court.

". . . even a modification clause not providing for advance notice does not render an agreement illusory, because the agreement also contains an implied covenant of good faith and fair dealing."

And California courts have held, Your Honor, that even in the face of a direct contractual right -- and this is from the *Tompkins* case at page 1016, 840 F.3d 1016. The Ninth Circuit writes:

"California courts have held that the implied covenant of good faith and fair dealing prevents a party from exercising its rights under a unilateral modification clause in a way that would make it unconscionable."

There's no allegation here that anything unconscionable occurred.

There's another case, *Serpa*, S-e-r-p-a.

THE COURT: So, in other words, if the provision that is adopted later would have been unconscionable when adopted originally, then it can't be adopted later. Is that what that

stands for?

MR. SNYDER: I believe it says -- and the *Casas* case holds this. *Tompkins* is quoting or citing Casas. The *Serpa* case, I think, holds this -- that if a subsequent modification renders the contract unconscionable, such as some hypothetical that we can think of --

THE COURT: Right.

MR. SNYDER: -- then the implied covenant of good faith and fair dealing may step in and bar the contracting party from exercising its contractual rights in a way that would be --

THE COURT: So, in other words, if you could never have agreed to it in the first place, you're not -- Facebook isn't allowed to adopt the same provision later.

MR. SNYDER: I'm not sure whether unconscionability is only in the substantive outcome or the change, or delta --

(Co-counsel confer.)

MR. SNYDER: Yeah. Okay. Thank you.

So *Perdue* actually answers the question, *Perdue versus Crocker Bank*, California Supreme Court, 38 Cal3d. 913, at page 924:

". . . we hold as a matter of law that the card is a contract authorizing the bank to [unilaterally] impose such charges, subject to the bank's duty of good faith and fair dealing in setting or varying such charges."

So in the end, if a party is acting in a piggish or blatantly commercially unreasonable way, the courts are going to step in, in equity, and say -- in law and equity and say, "No, we're not allowing this."

And so this is not that case.

THE COURT: That's about, like, increasing fees without -- okay.

MR. SNYDER: And that's not this case, of course.

THE COURT: Could I ask you, though. I mean, why would it be so difficult for Facebook to simply say -- let's say I agree to a terms of service, and then there's some significant change in the terms of service. And I go on to my Facebook account. Why would it be so hard for Facebook to just create a pop-up which says, "Our terms of service have changed. You need to agree to the new terms of service before you continue to use Facebook"?

(Co-counsel confer.)

MR. SNYDER: Okay. Two answers to that.

One -- I got it, Josh.

One, they did.

THE COURT: Okay. But that's not in this motion.

MR. SNYDER: I understand you asked a question.

And so Judge Donato writes, Facebook sent -- that -- the fact that the terms were changing, quote:

"They were provided notice that the terms of the

user agreement were changing through an e-mail from Facebook sent directly to the e-mail addresses each plaintiff had on file with Facebook. Each plaintiff -- none of whom disputes remaining an active Facebook user to this day -- would also have received a 'jewel notification' on his individual Facebook newsfeed. This individualized notice" --

THE COURT: I read --

MR. SNYDER: Okay.

THE COURT: I read --

MR. SNYDER: So that's point one.

Point two is, as a commercial actor, Facebook has its own business reasons why it does or doesn't decide to have pop-ups as opposed to e-mail notifications. But that doesn't give rise to any cause of action under the common law or any congressional statute.

And, again, it comes full circle, Your Honor, to Facebook's basic point.

Your Honor just asked a good question, a very good question.

Should the Facebooks of the --

THE COURT: Facebook pays you a lot of money to say things like that --

MR. SNYDER: No.

THE COURT: -- to me.

MR. SNYDER: No, Your Honor.

Should social media platforms be required to provide pop-up notices when they change their terms of service? That's a very interesting question. I'm sure editorialists would agree and disagree; legislators should agree and disagree.

If that is going to be the law of the land, it's going to be because either Article II legislature says so, a state legislator says so, the executive branch, the FTC says so.

THE COURT: Or because California contract law requires it.

MR. SNYDER: Or because California contract law requires it.

And there is no principle of contract construction or canons of interpretation that would read the SRR and California law to render invalid Facebook's absolute constitutional and contractual right, because the right to contract is constitutionally based. We have a right to write our contracts reasonably. And so long as they're not unconscionable or violate the implied covenant of good faith and fair dealing, as Judge Grewal said and other judges said, the plaintiff is not without a remedy. They can stop using Facebook if they don't like it.

THE COURT: Okay. So what I would like on this issue is just a letter from both sides by Friday, listing -- no argument, no parenthetical -- just listing the cases that I

should read on this issue. Okay? Because it wasn't -- it didn't -- I know there were page limits in the brief, and it's nobody's fault, but it didn't get great treatment in the briefs, and I think it's an interesting and important question.

MR. SNYDER: I know I'm about to sit down. May I just ask two questions? The first is: Does Your Honor want me to address Question 2, which is the incorporation by reference question?

THE COURT: No. That's okay.

MR. SNYDER: Okay. And then, two, I'll just ask Your Honor to consider giving me five minutes.

THE COURT: Let's see where we are at the end because --

MR. SNYDER: It's very pertinent to -- of course, I showed restraint, and I hope -- but the arguments I just made obviously dovetail with an informed standing analysis.

THE COURT: I will tell you that I've given a tremendous -- both at the last hearing and in preparation for this one, I've given a tremendous amount of consideration to the standing issue.

MR. SNYDER: Of course.

THE COURT: And I really don't think I need to hear any further argument on it.

MR. SNYDER: Well, I will just -- I appreciate and respect that. If I can reserve, at Your Honor's sole

discretion, three minutes at the end, I'd appreciate you begging my indulgence.

THE COURT: So what I propose that we do now is, I propose that we take a five-minute break. We've been going for about an hour and a half. And then we can return and I can hear from the plaintiffs and maybe give Facebook the last word briefly, hopefully not on standing.

And we'll aim to wrap up at about 1 o'clock so that people can get some lunch. Okay?

All right. Thank you.

THE CLERK: Court is in recess.

(Recess taken at 12:02 p.m.)

(Proceedings resumed at 12:12 p.m.)

MR. LOESER: Your Honor, while people are piling in, I have a PowerPoint that I'll hand up to you.

THE COURT: You realize you're not going to be able to get through this PowerPoint.

MR. LOESER: I know. But you read everything; so --

THE COURT: We don't need to go through this PowerPoint. What I would like to do is maybe just jump right in and have you respond on the consent points. I mean, I think that's sort of the meat of it.

How do you want to respond to their points regarding consent with respect to third-party apps and business partners? Why don't we start with third-party apps.

MR. LOESER: Sure. And tracking with the questions that you asked -- and just so you know, I'll be answering some of the questions, including the consent questions. Ms. Weaver will jump up for other matters. And at some point, we'll probably occupy both podiums unless you tell us not to.

THE COURT: Great. That's fine.

MR. LOESER: And the -- and so Question Number 2 is this issue of corporation; so we'll get back to that and we'll talk about consent.

First, just as a threshold issue, this notion that there are no privacy rights for people on Facebook, I won't waste a lot of time on that. It's obviously -- it relates to consent in the sense that they're saying that it really doesn't even matter if you consented or not; there's no privacy rights. And that's clearly wrong and clearly inconsistent with positions Facebook has taken in other cases like the SCA case that we talked about the last hearing. So, but I think it's obviously wrong. And so the actual disclosures are extremely important.

And we talked a bit about this at the last hearing as well, but it's worth just mentioning. And as you have indicated in a lot of your questions, it's obviously a very factual issue. It's generally not decided on motions to dismiss. It's not the least bit uncommon for --

THE COURT: Well, a fair number of courts do decide them on a motion to dismiss, but they don't -- it seems like

they often do so without inquiring whether it's appropriate to decide them on a motion to dismiss.

I mean, they kind of just look at the language, and they say that was disclosed, and they move on without inquiring whether there are other plausible interpretations of the language and whether it's appropriate for them to be making these rulings at a 12(b)(6) stage as opposed to a later stage.

MR. LOESER: Yeah. I think, fortunately, in this district, where you had a lot of social media cases, cases against Facebook, Google, Yahoo, the courts have been extremely thorough in their analysis, have looked at what the disclosures really say.

The *Opperman* case, which we talked about last time, Judge Tigar really indicated what the standard was very clearly. He indicated why it's not appropriate to decide. Where you have language that people can interpret in different ways, it is not appropriate.

So there are cases -- Facebook likes to talk about the *Smith v. Facebook* case in which the Ninth Circuit ruled as a matter of law. That really stands in stark contrast to this case. There, the case was about whether Facebook breached its duties or its promises when it monitored website browsing. And they disclosed precisely that, that they monitor website browsing. That's the kind of circumstance where the Court can say, "Look, there's no dispute. There's nobody even disputing

it." The plaintiffs didn't even dispute that the terms were binding on them, unlike this case. So that's the rare circumstance.

The much more common circumstance is in the litany of cases that we've cited in our briefs and which Judge Koh and Judge Tigar and others go through and very clearly indicate, when you have two competing interpretations, it's not appropriate for a motion to dismiss.

So, first, the threshold issue is --

THE COURT: So on that issue, let me ask you. What would you expect -- so the idea behind not ruling on an issue like this as a matter of law at the motion to dismiss stage is that there will be something that will help you, at a subsequent stage in the litigation, figure out what the true answer is. Right?

And so what is that in this case? I mean, what information -- let's say we got to the summary judgment stage. What information would I be able to bring to bear on this interpretation question that I can't bring to bear now?

MR. LOESER: Well, first of all, Your Honor, just -- and this is, again, not the least bit unusual. We have an interpretation of these documents, and they have a different interpretation. So that just, by its nature, means there's a disputed issue of fact, subject to you or a jury then decides whose interpretation is more reasonable.

THE COURT: Well, it depends how plausible your interpretation is. But let's assume we get past the motion to dismiss stage.

Contract interpretation is a question of law; right? I mean, if it is a contract, would it be a jury question --

MR. LOESER: It would.

THE COURT: -- as to what this disclosure disclosed?

MR. LOESER: When there are two plausible interpretations of a contract, I think it's a question of fact. The jury decides what the reasonable interpretation is.

THE COURT: I always thought it was like -- I thought California law was pretty clear that contract interpretation is a question of law for the judge to decide.

MR. LOESER: Well, here's how Judge Tigar looked at the issue in the *Opperman* case. And it's a bit of a long quote; so I'll try and skip to the end but frame it. And this is 205 F.Supp.3d at 1077. The Court is looking at exactly what you're looking at. They say the contract and the terms means this. The plaintiff says it means that. The plaintiff said they didn't disclose --

THE COURT: And it's for the jury.

MR. LOESER: Yeah, for the jury. And the judge --

THE COURT: Judge Seeborg has -- I think it's a Facebook case, where he says the same thing. But I just --

MR. LOESER: Well, I'll just read the end, the last --

THE COURT: Is there any analysis of California contract law in those cases and any engagement on the question of whether it should be a judge or a jury question?

MR. LOESER: Well, I believe so. And I'd have to flip open *Opperman* to see if he's citing other Ninth Circuit or federal cases or California cases. I believe he does dip into state cases, but I'll check that.

But the last line of the quotation I was going to read, he writes:

> "It remains to be seen whether these expectations were objectively reasonable, but that is a question for the jury, not this Court."

And there are other cases that we've cited in which the courts indicate that the Court would have some discomfort substituting its own views for that of the jury when deciding these disputed issues of fact.

So I think the other thing, you're asking what would we show later? Well, discovery would occur. And in addition to just the contractual terms, I think it's also important to hear --

THE COURT: But what discovery would be relevant to the question of how a reasonable Facebook user in 2012 would interpret this language?

MR. LOESER: Well, we could certainly ask questions about why -- what does the language mean to Facebook? What do

they think the theory is?

For example, there were things said today about how nobody that uses Facebook and shares anything would ever believe anything is private. Well, I'm pretty sure that's not the view of executives at Facebook. They would strongly disagree with that statement. I know they would, because they've said just the opposite in courts and they've said just the opposite publicly.

So there's all kinds of testimony we could elicit about the surrounding circumstances of the disclosures and the reasonable expectations of Facebook and people utilizing Facebook.

THE COURT: I assume you would ask for all documents that reflect Facebook's decision for what language to adopt in its terms of service or in the section in its terms of service on apps.

MR. LOESER: Right.

THE COURT: Third-party apps.

MR. LOESER: There would be all kinds of questions.

MS. WEAVER: It's funny you should raise this because one of the points that we were talking about is that in our -- we issued a set of very narrow requests for production, and our RFP Number 5 sought, actually, the disclosures that Mr. Snyder was referring to; i.e., please produce to us all documents that reflect notice to users when you change your terms of service.

And we received nothing from them that directly communicated to users, "We are changing terms of service." So maybe that's just incomplete discovery. We haven't had the opportunity to pursue it. But certainly, that notice issue, in the terms of reasonableness and context, is important.

MR. LOESER: If you look through the cases that decide the issue of what the disclosures mean on summary judgment and other stages, invariably they're referring to deposition testimony of the plaintiffs; they're referring to deposition testimony of the executives about what was intended.

THE COURT: But the test is a reasonable Facebook user; right? It's not -- it sounds like from the way the courts treat it and it sounds like -- it sounds like both sides agree that it's the reasonable Facebook user at the time. And so it sounds like an objective inquiry, not a subjective one, where the actual -- where the actual views of the plaintiff would be dispositive, which is weird because it's a contract and we're --

MR. LOESER: Right.

THE COURT: -- inquiring about whether there was a meeting of the minds.

MR. LOESER: Well, and I think that the -- like, the allegations in the Complaint by the plaintiffs we would say are reasonable interpretations of the contract. And so it bears upon whether the language is reasonable, that you have a bunch

of people who read it that way and they reasonably concluded that that's what it means.

You know, I can -- there's a variety -- if discovery were to go forward here, we would ask for all kinds of information that I think would fill out the question for you about: Whose interpretation is more reasonable? What is it based on? What did Facebook executives believe? What do they think these things mean? And how did people like the plaintiffs react to them and take them into account when deciding what to do?

THE COURT: You were going to say, other than that sort of discovery. I think I interrupted you before you were about to say that there's some other type of information that could be brought to bear.

MR. LOESER: Right. I would just refer the Court to the fact that there are a number of regulatory agencies that have investigated Facebook, investigated their conduct, their disclosure, the terms of service, data policy, all of these documents they took into account.

In England, the DCMS collected a huge amount of information, evaluated Facebook's conduct, and came to conclusions. And those conclusions were that Facebook had not obtained lawful consent and Facebook had not been clear.

And, you know, the FTC, back in 2011, looked at these same disclosures, evaluated them. At the time, the issue was -- which is still an issue pertinent to today, which is: Was it

clear to people that their privacy settings didn't actually control who got to see their information? The FTC said, based upon its collection of evidence, "No, it's not clear. These disclosures are not adequate."

And so that kind of evidence was gathered by these regulators, and they came to a determination which --

THE COURT: Are you talking about the current FTC investigation?

MR. LOESER: In 2011 -- they're sort of joined. In 2011, the FTC told Facebook, "Your disclosures are not adequate. You are not making it clear to people that your privacy settings don't actually control who sees this stuff."

THE COURT: Right. I was confused. I thought you were talking about -- because what the FTC is investigating now is whether Facebook violated the terms of the consent decree --

MR. LOESER: Right.

THE COURT: -- by not adequately disclosing --

MR. LOESER: Right.

THE COURT: -- what it was doing with this information.

MR. LOESER: Right. Because what Facebook agreed in 2011 was that if they were going to disclose information in a way that exceeded people's privacy expectations or privacy settings, they would have to get express informed consent to do that.

And the FTC is investigating whether, when they gave the information -- I think, based upon public disclosures and articles -- when they gave information to whitelisted apps and to business partners and Cambridge Analytica, were they, in fact, exceeding the users' privacy settings, which is what we allege in this case, and the FTC is evaluating whether that occurred.

Now, at the motion to dismiss stage, I think it's fair to look at that. You don't have to --

THE COURT: But is the FTC inquiring into whether, like, a reasonable Facebook user would understand these disclosures to mean what Facebook says they mean? Or are they engaging in a somewhat different inquiry; namely, whether Facebook violated its agreement with the FTC, the consent decree with the FTC?

MR. LOESER: I'm not in the room, Your Honor, but I'm sure that both of these things are being discussed.

I would think that if they're saying to Facebook -- and Facebook's counsel, who I think is involved in that investigation, could probably get up and explain this better than me. But if the allegation is they violated the consent decree -- and the consent decree required that they get express consent if they were going to exceed privacy settings -- then what Facebook, I'm sure, is telling them is that "We didn't exceed privacy settings, and here are our disclosures." The

FTC, I would think, would be evaluating those disclosures.

THE COURT: I mean, I think about, like, the food labeling cases, where there's something on the label of vitamins or something and the plaintiff comes in and argues that it's misleading. And there's a battle of experts. And the experts conduct surveys, and they offer opinions about what the ordinary consumer would interpret this disclosure on the label to mean.

I mean, when you hear "reasonable Facebook user" and "What would a reasonable Facebook user understand these words to mean?" you think about those surveys. But, again, it seems sort of weird in the context of a contract between, you know, Facebook and individual users to conduct that sort of inquiry.

So anyway, I was curious if you thought that that sort of thing would be relevant to answering the question.

MR. LOESER: Go ahead.

MS. WEAVER: Well, yes. I mean, I think, certainly, the user experience in this particular case --

THE COURT: I'm sorry. I'm enjoying the contrast between what he's brought up to the podium and what you've brought up to the podium.

MS. WEAVER: It's a little -- uh, yeah. What can I say?

THE COURT: Sorry. Go ahead.

MS. WEAVER: But I do think you're right, Your Honor,

that the user experience, if we got to trial in this case, we would want to actually replicate what the platform looked like in 2007. I mean, we have plaintiffs who joined in 2005, before there were any policies.

So the question is: What did it look like? How did they change it? Is it reasonable to understand that you would go back -- and as they added -- I mean, for example, the app setting was not added until December 2009. And what -- you know, somebody who signed up, as you noted previously, might have a very different experience trying to hunt for that when they thought that they knew already how the platform worked, especially if they aren't getting a notice saying, "This is where you need to go."

THE COURT: But in any of these other cases, like you mentioned Judge Tigar's case -- that was the *Safeway* case; right? And he said this is a question for a jury. Was there a battle of experts in that case? Or was it a question about what the individual plaintiffs in that case understood the language to mean?

MR. LOESER: I'm just looking at the decision, Your Honor, to see if there's any reference to the actual --

THE COURT: I think in the decision, he's just looking at the language and saying -- I didn't see any reference to, like, a battle of the experts or anything. I was curious if there was one at trial or if there even was a trial. I don't

even know if there was a trial.

MR. LOESER: Yeah. All I can say, just looking at this quickly, is the Court was considering the evidence that the plaintiffs presented, which included their own testimony about what they believed the service was supposed to be, based upon the disclosures that were given to them.

MS. WEAVER: But here, also at issue is the conduct. I mean, there are a lot of questions of fact around what -- and, in fact, you know, even in the defendant's presentation, there's a citation here to a paragraph 485, when we were discussing business partners. And, you know, we've quoted:

> "Facebook notes that this list is 'comprehensive to the best of our ability.'"
>
> But it stated:
>
> ". . . it is possible we have not been able to identify some integrations . . . ," et cetera.

So there's a lot of unknowables out there. We've tried to plead a very particularized complaint, but we don't actually know -- to be truthful, we don't know all of the facts about business partners. We at least know about some of the apps because early on, there were more disclosures. There have been fewer public disclosures.

THE COURT: Yeah. But you don't go past the 12(b)(6) stage because we need to find stuff out. The question I'm asking is: What type of information would I use that I'm not

capable of using now at the 12(b)(6) stage to resolve this interpretation question? Which seems like -- it seems like it's a hybrid contract interpretation question/disclosure interpretation question.

MR. LOESER: Well, and I think -- and I apologize that we're going back and forth; but, again, we'll do it until you tell us we can't.

But the point you made earlier about changing expectations about how social media works, for example, I could see the value of an expert who would talk about that, who would talk about what people reasonably expected based upon how apps were used and a new technology and the fact that -- it could look at language that Facebook uses now, for example, and contrast it to what it was using before to make the point that people reasonably -- their interpretation -- the plaintiffs' interpretation that they provided in the Complaint is a reasonable one.

So, sure --

THE COURT: But you probably could have done that; right? I mean, that could have been something that we considered at the 12(b)(6) stage -- right? -- the language that Facebook uses now compared to the language it used before?

MR. LOESER: Correct, and we have cited that.

I'm suggesting that there would be a role of an expert witness to talk about reasonable expectations.

Also, I don't want to rule out the relevance of actually taking depositions of Facebook people. You know, Mr. Zuckerberg talks a lot publicly about how important privacy settings are and what they intended to communicate with their disclosures and what mistakes were made and what needs to be made more clear.

Well, a deposition in which we get into those topics, I think, would be highly useful for determining ultimately whether the plaintiffs' interpretation is reasonable. So I think there's discovery of Facebook people who were involved in running the company, given how important they say privacy is to people's experience.

And I think that's a point that's worth stepping back and making. Then I really do want to get into the specific disclosures.

And that's the nature of Facebook. I think we all should have a lot of concern and take pause when Mr. Snyder tells everyone that there is no expectation of privacy when people use Facebook. And the case law, I think, is really important to consider when it talks about what happens when a company creates the reasonable expectation of privacy and induces people to share. And that really is the currency of the realm for Facebook, is they need people to share data. That's how they make money. That's how they made $55 billion last year.

And this notion that you can create this reasonable

expectation of privacy to induce people to share but then come into court and say that it's completely unreasonable, as a matter of law, for people to have any expectation of privacy I think is really concerning. And particularly on a motion to dismiss, it really shouldn't help Facebook.

But more broadly, I think it's a very concerning point that they're making here, given how much they've done to create this Facebook experience that gets people comfortable sharing.

So, but getting into disclosures themselves, you know, there are -- and the briefing has gone through and the Complaint goes through in some detail the different disclosures Facebook made. Your Honor, I think, rightly noted, when Mr. Snyder was referring to our discussion of those disclosures as somehow admissions that people were given information, obviously, those were not admissions.

In fact, usually, the paragraph -- like he raised paragraph 599 which talks about a disclosure. The very next paragraph, 600, says contrary to that disclosure.

So we have gone through all these things. I think there's a reason why we listed them in the Complaint. We do want the Court to consider them.

And in our briefing, we've gone through and we've put these disclosures and the misconduct into different buckets. I think that, just for the sake of time, we won't go through all of the categories; but Your Honor is aware there's business

partner disclosures that we think are misleading; there's whitelisted apps; there's disclosures to advertisers. They said they wouldn't disclose your information -- personal information to advertisers, but it was misleading because a lot of the business partners are advertisers. And then there's these disclosures about third-party apps.

And so what we'll talk about now, I think, are business partners and third-party apps --

THE COURT: Okay.

MR. LOESER: -- and websites.

So -- and we talked about business partners in some detail before; so perhaps that's a shorter conversation.

But what Facebook told people was: We may provide information to service providers to help us bring you the services we offer.

And we've listed these disclosures on page 26. We learned from the last hearing. We have paragraph references on most of these slides. Here, some of these disclosures were provided in a declaration, and we refer to the declaration.

THE COURT: But what I want to -- I understand the disclosure. I understand that the description of who is being given information in that disclosure seems different from the list of companies that you've included on paragraph 400-something of your Complaint.

But what I guess I'm still struggling with a little bit

with respect to business partners is, putting aside the device manufacturers, how did Facebook -- I mean, they say that: Oh, those are just -- those other ones are just third-party apps.

And I guess my response to that is, I look through your Complaint and I'm not really sure who those people are or what bucket they should fit in. I think I get the device manufacture point. I think it's kind of a weak point for you because I think it's pretty obvious that if I'm using Facebook on my iPhone, iPhone is going to have access to my data. Maybe less obvious in 2012, but probably still fairly obvious.

But, so that's why I asked you, pick a couple of these companies and explain to me a -- couple of these business partners and explain to me what the complaint alleges about what happened with respect to those companies that was not disclosed. I just don't -- I still don't quite understand.

MR. LOESER: Right. And Ms. Weaver is going to address that. But I will make the point, just before you move on to that, I think it is important to look at the specific language of the disclosures themselves. And where terms such as "service providers" or "vendors" are used, that's the analysis that you have to do and that Judge Tigar did and Judge Koh did when looking at the particular disclosures.

THE COURT: I totally get that point.

MR. LOESER: Yeah. And so if there's --

THE COURT: I get that point.

MR. LOESER: Right.

THE COURT: But the part that I don't quite get from your Complaint is, what were the circum- -- what did Facebook do with this information? Did Facebook just say, "Yahoo, here, have all this information"? Or what was the arrangement between Facebook and these business partners that resulted in the business partners getting the data? And was it through friends? You know, was it through my friends that these business partners got my data, or was it through me, or was it directly from Facebook? All of that is a little bit fuzzy.

MR. LOESER: Right.

MS. WEAVER: So those allegations, Your Honor, are in 489 and 490, for example. The three that we picked included Yahoo, which you just referenced.

THE COURT: Okay. Wait. Hold on. Hold on.

MS. WEAVER: No problem.

THE COURT: Let me go to those. Sorry. You're --

MS. WEAVER: Yes. So 484, you're right, was the paragraph that lists the 53 business partners that Facebook has currently identified.

And just to circle back to the point I made earlier, on the issue of determining at a motion to dismiss whether these particular disclosures are adequate, you might want to know if there are other entities out there that are not on this list.

And Facebook is saying here that there may well be others.

So, of course, I understand our burden at the pleading stage, but it's a little bit of a Catch-22.

What we know is at 486, the business partnerships were formed as early as 2007. We know that, for example, with Yahoo, if you go to 489:

". . . Yahoo, was [sic] able to read the streams of users' and users' Friends posts, while others, like Sony, Microsoft and Amazon, were able to obtain . . . e-mails."

And so the question arises, if, as Mr. Loeser says --

THE COURT: So what do we know about how? Like, was this --

MS. WEAVER: We know that they used --

THE COURT: Were they obtaining this stuff through my friends, or were they obtaining it through some interaction with me or, sort of, through some separate partnership or arrangement with Facebook?

MS. WEAVER: So the technical answer is that they were obtaining content and information through a Graph API. That's not exactly what you are asking, but I wanted to give you that information as well. So it's through a platform that Facebook sets up so that they can obtain it.

And, yes, it's our understanding that what they are getting is the world. And, in fact, I believe -- maybe it was Netflix. It wasn't just friends. It was friends of friends.

So that's an even larger community. And, again, no disclosure, we would argue, applies to this.

THE COURT: But is it as a result of my friend interacting with Netflix?

MS. WEAVER: Yes.

THE COURT: With the Netflix app?

MS. WEAVER: Yes.

THE COURT: So it is the same -- there is really an overlap between your list of business partners and third-party apps?

MS. WEAVER: Right. And -- exactly. And I'm not really sure -- we're not sure -- there's been -- there are three groups; right? There's apps before 2015. And then the FTC and Facebook agreed that those apps would be disconnected. And then it was only later revealed that there were these whitelisted apps that includes Netflix and, for some reason, Airbnb and Alibaba. And, you know, there's a -- and, frankly --

THE COURT: Right. But the way -- it sounds like what you're saying -- but I want to make sure I understand -- is that the way these companies, like Netflix, Alibaba, whoever, got my data -- I'm using me hypothetically; I'm not on Facebook but -- the way they got my data is by interacting with my friend, and I had not adjusted my app settings to prevent the apps from getting my data from my friend.

So it's basically the same analysis for these business partners as it is -- with the possible exception of the device manufacturers, it's basically the same analysis for these business partners, in terms of disclosure, as what you're calling third-party apps.

MS. WEAVER: That is true, but with an important exception. Facebook actually disabled the app setting that turned off app sharing in, I believe, 2015, and they told users that. And yet, after that date, they gave data to whitelisted apps.

THE COURT: Right. Okay.

MS. WEAVER: And so there's no mechanism there. Like, our understanding is that it is somehow through friends of friends, but there's no consent and there's no ability of the user to turn it off anymore.

THE COURT: So then what is the point of creating this category of business partners in your complaint? I mean, it seems like kind of an artificial category of entities receiving my data.

MS. WEAVER: Well, I agree with that.

THE COURT: Seems like half of them or more should just -- they fall in the same category as what you're describing as third-party app sharing, and the same analysis is to be conducted.

MS. WEAVER: Yeah, I don't disagree. I think,

honestly, part of it is a function of timing.

We filed this case. It was about Cambridge Analytica and apps. And then this other story broke. And if you'll recall, complaints were filed, and we said, "No, this is actually related. It's all about third-party data," and we brought it in. And we have a different body of information about business partners and apps.

And so the truth is, we don't know exactly. I mean, we know that Facebook makes some facial argument that it was device makers in the beginning and that that was how they were accessing. But there's a lot that remains unknown, beyond the fact that we know, for example, a New York attorney general is now investigating Facebook, focusing specifically on the issue of business partners.

So, you know, I think in some broad sense you are right. What we have alleged.

THE COURT: So it sounds like -- I mean, it almost sounds like what you're saying is that there was this second *New York Times* article which did not reflect a proper understanding of what was happening, and you sued on that *New York Times* article that didn't reflect a proper understanding of what was happening.

MS. WEAVER: You sound like Mr. Snyder. No, that's not true. I mean, let's start at this premise.

THE COURT: Don't ever say that to me again.

MS. WEAVER: I'm so sorry.

MR. SNYDER: Oh, God. You hurt my feelings.

MS. WEAVER: We've retained experts. We've analyzed how the --

THE COURT: It sounds like *The New York Times* article sort of categorized them -- put them in two separate buckets and you just adopted that for the purpose of drafting your Complaint, but it's wrong.

MS. WEAVER: That's not true.

So what I would just say there is, our understanding is there are technical differences. So the early apps got -- obtained the data through Graph API Version 1.0. That was then turned off at one point and turned into Graph API Version 2.0. And then, at some point in time, these apps developed their own APIs.

It's just a way to access data. And frankly, our first Complaint had a lot more detail about this, but it seemed very confusing, and so we took some of that out to clean it up here and keep it at a high level.

At a high level, what is happening is sharing without user consent, without disclosure. And that's where we are. So --

MR. LOESER: Well, and I just think from a disclosure point, Your Honor, there is a distinction, as you've noted, between device manufacturers and these other businesses. And I don't think you can read the disclosures that they provided

about service providers and vendors and the like and have that -- and say that it's not a plausible interpretation to say that what they did exceeded that; that these business partners, however you want to describe them, whatever they are, don't fit the categories that they've described.

THE COURT: Well, I think that -- I think that that is true, but -- so you look at this list of business partners, and you say, well, this disclosure about service providers -- right? -- seems quite a bit narrower than the list of business partners that you've included in the Complaint.

But the problem is, we now have established that many of these companies that you list as business partners obtained my data as third-party apps through my friends.

MS. WEAVER: But they're not apps --

MR. LOESER: Frankly, Your Honor --

MS. WEAVER: -- if I may.

MR. LOESER: -- that may be true for some, and it may not be true for others.

I think that it's important to consider that this idea that these business partners are just apps is a new idea from Mr. Snyder.

The fact of the matter is, they had different disclosures. And previously, they talked about disclosures with regard to apps, and then they pointed you to these disclosures with regard to service providers as a different disclosure. Not the

app disclosure. That was not what applied here.

They said, "No, no, Your Honor. What applies are these disclosures regarding service providers and vendors." And they said, "Those are the disclosures that we want you to evaluate when deciding that we did, in fact, give people information that would indicate that content and information was shared with these entities that we're referring to as business partners."

THE COURT: So maybe what I need to look at to have a better understanding of this is -- you're saying, well, Mr. Snyder is now calling them apps, but there is a -- it looks like you have cited in your Complaint a letter from Facebook to the Energy and Commerce Committee, sort of talking about these business partners, and I should go read that letter to develop a better understanding of --

MR. LOESER: Right.

THE COURT: -- the business partners.

MS. WEAVER: If I may, just to correct the record, so business partners are not apps. If you look at the list at 484, Acer is not an app; Samsung is not an app. The examples that we were looking at as well, Yandex is a Russian search engine; it's not an app. Amazon has an app.

THE COURT: But if you --

MS. WEAVER: But app developers --

THE COURT: But I assume that if you -- Yandex, the

Russian search engine, I assume -- I mean, again, it's hard --

MS. WEAVER: So -- so --

THE COURT: -- to understand from the allegations, but I assume that the idea is, you use the Russian search engine through Facebook, and so it's an app that you're using --

MS. WEAVER: I don't --

THE COURT: -- on Facebook.

MS. WEAVER: I don't know that that's true, Your Honor. And, in fact, if you read our allegations, from 488 through 4- -- we move into the whitelisting, but at 493, just for the business partners, they are giving business partners special access to Facebook identifiers, including, for example, at 48- -- give me a moment here.

If you look at 496, for example, we start talking about whitelisted companies who are apps.

THE COURT: Well, before we get to --

MS. WEAVER: Okay. Fine.

THE COURT: I want to not get bogged down in whitelisted apps. I want to understand --

MS. WEAVER: Fine.

THE COURT: -- first, the distinction between business partners and apps.

MS. WEAVER: Right. And what I can say is, a business partner -- so it's not apps. It's app developers. Right?

So Cambridge Analytica and that sort of -- that first

category is about app developers. Business partners are app partners who are, among other things, advertising on the site.

And so if you look, there are allegations at paragraph 710, where we have e-mails from Mr. CEO Zuckerberg talking about developing relationships with business partners. And what he's talking about, some of those are apps and some of them are not. And those relationships, some of them were bartering, and some of them are allowing offset for advertising costs with these businesses.

So we don't have the agreements. They haven't been public. But I guess I would say that these are businesses who may have apps but they are not app developers.

The agreements that Facebook had with the app developers was a barter transaction where they gave access to user content and data so app developers could develop an app.

THE COURT: But the thing I'm struggling with is, you're drawing that distinction; but in looking at Facebook's disclosures --

MS. WEAVER: Right.

THE COURT: Right?

-- what Facebook says is that if your friend interacts with an app, the app can get all -- I mean, it doesn't say it this clearly but -- the app can get all of your information -- right? -- unless you change your app settings.

MS. WEAVER: Right.

THE COURT: And so --

MS. WEAVER: Those app settings didn't apply to business partners.

THE COURT: Okay. Where does the Complaint explain that, that those app settings did not apply to business partners?

MS. WEAVER: Yeah. That's 710?

MS. LAUFENBERG: 602.

MS. WEAVER: 602.

THE COURT: Paragraph 602?

MS. WEAVER: Yes. That's page 229.

THE COURT: And is there anything that you -- I mean, I'm not saying that you necessarily have to, but I'm just curious for helping -- in terms of helping me understand it. Is there anything that you cite for that? You have a lot of citations to reports and articles and --

MS. WEAVER: Right.

THE COURT: -- letters and things like that.

MS. WEAVER: Right.

THE COURT: Do you cite anything in your Complaint for that?

MS. WEAVER: Sure. I mean, we have -- we cite extensively the DCMS report, which is the body of the U.K. House. And the report -- is it --

MS. LAUFENBERG: 710.

MS. WEAVER: Paragraph 710.

THE COURT: Okay.

MS. LAUFENBERG: (C).

MS. WEAVER: "The fact that Apps including Whitelisted Apps and Business Partners 'were able to circumvent users' privacy of platform settings and access friends' information, even when the user disabled the Platform,' is 'an example of Facebook's business model driving privacy violations.'"

This is from the report itself.

THE COURT: Okay. I will admit that I have not read that report yet. Okay.

MS. WEAVER: There are a few out there.

THE COURT: Okay.

MS. WEAVER: So if you're ready to talk about whitelisted apps, then the difference there gets even more confusing because, here, Facebook has told users "We are cutting off app access"; and then, if you look at paragraph 497, the DCMS committee says that this whitelisting was driven primarily by revenue and economics.

And it is supported by other e-mails, which we cite, which have come out, basically saying Facebook was giving preferential treatment to companies that it should have rightfully been cutting off. And these included Lyft, Airbnb, and Netflix. So --

THE COURT: You mean should have been cutting off -- so, in other words, this was in 2015 when Facebook said, "We're going to stop allowing third-party apps to grab your information through your friends," and they identified a date by which they would do that. And there's this subset of apps that you're calling whitelisted apps that continue to have the ability to grab my information through my friends.

MS. WEAVER: And -- yes, exactly. And the app controls were cut off so users couldn't change that. That, Your Honor, is at 499.

THE COURT: The what were cut off? Sorry?

MS. WEAVER: Sorry. The app settings were cut off. So at this point, they didn't exist on the platform for users to cut off apps.

THE COURT: Okay. Where is that?

MS. WEAVER: I'll get that to you in a second.

But if you look at paragraph 499, there is your date.

". . . failed to state that tens of companies were given special whitelist access beyond May 2015."

And then what later comes out, you know, there's another report at paragraph 502 that Facebook is striking deals with RBC, Nissan Motor Company, et cetera.

And so they are continuing -- and I have to be honest. You're right. At some point, when are these business partners and when are these whitelisted apps? I don't know. I take

your point well that maybe it doesn't matter to some extent, because these are all adhering to the same theme, that these are in violation of, what we would say, users' reasonable expectations that their privacy controls could prevent this kind of sharing and that their publishing controls, for example, would prevent that kind of sharing.

THE COURT: Okay. So what about --

MS. WEAVER: Paragraph 375 is the app setting removal in 2015.

THE COURT: Sorry. What?

MS. WEAVER: Paragraph 375 answers your question about the removal of the app settings, the ability to turn off apps.

MR. LOESER: So, Your Honor, why don't we jump to third-party apps because Mr. Snyder spent a good deal of time trying to explain to you why the disclosures regarding third-party apps meant that everything that happened here that was bad was consented to by Facebook users. And I think he's wildly wrong in that regard.

THE COURT: I'll let you get to that, but just, I want to read that paragraph that Ms. Weaver pointed me to.

Was it 375?

MS. WEAVER: Yes.

MS. LAUFENBERG: Correct.

MS. WEAVER: So:

"The 'Apps others use' control panel" --

THE COURT: All right. Let me just read it.

MS. WEAVER: Sure.

THE COURT: Okay.

MS. WEAVER: And paragraph 600 reiterates that.

MS. LAUFENBERG: And 601 as well.

MS. WEAVER: Again, citing the DCMS report.

THE COURT: Okay. All right. Thank you.

Go ahead.

MR. LOESER: Okay. So here's the deal. Facebook creates a platform that they say provides everybody with everything they need to know to control what happens to their information. They say that a lot. You control exactly what happens to your information.

And the DCMS report, which Ms. Weaver just mentioned, after their exhaustive study, determined there's very little the user can do to prevent their information from being accessed. And Cambridge Analytica is a good example of users were told you can indicate what your privacy wishes are by using your privacy settings. You set to friends only, and, lo and behold, Cambridge Analytica gets the information.

So where, I think, their argument falls apart is when you look at paragraph 596 through 598, which we have on Slide 38 here for just ease of reference, and that's this "only in connection with your friends" language.

So the very same disclosure that Mr. Snyder put up and

tried to explain to you "This is it. This tells you everything you need to know," if you go down in that disclosure, there's the rest of the paragraph. And that paragraph says (reading):

"If your friend grants specific permission to the application or website, it will generally only be able to access content and information about you that your friend can access. In addition, it will only be allowed to use the content and information in connection with that friend."

And they have further explanation of what that means. They say (reading):

"For example, if a friend gives an application access to a photo you only shared with your friends, that application could allow your friend to view or print the photo, but it cannot show that photo to anyone else."

And that language changed a bit. And it's another issue, hopefully on summary judgment or at trial, when we're going through the data policy, which we don't think is a contract, we'll see the different ways that they said this. But they always had this restriction that it would only be used with your friends.

Now --

THE COURT: I wanted to go back and look at the provision that you just read me about photographs.

MR. LOESER: Yeah.

THE COURT: That they cannot share that with anybody else. Where is that?

MS. WEAVER: Paragraphs 596 and 597.

THE COURT: No. I want to look at the actual disclosure language.

MS. WEAVER: Oh, I'm sorry.

THE COURT: Can we use Exhibit 45? That's what we've been using.

MS. LAUFENBERG: Exhibit 40.

THE COURT: Exhibit 40. So that's the --

MR. SAMRA: 43.

MS. LAUFENBERG: 43.

THE COURT: Oh, sorry. 43. So September 7th, 2011. And where is this? On, like, page --

What page of that exhibit?

MS. WEAVER: I thought it was page 9. Is that right? 9 or 10.

MS. LAUFENBERG: 10, I think.

THE COURT: Exhibit 43 or 45?

MR. SAMRA: Your Honor, I have page 5 on Exhibit 43.

THE COURT: Page 5 on Exhibit 43. Okay.

"Controlling what is shared when the people you share with use applications."

MS. WEAVER: Right. And if you go to the last

paragraph there, that's where the language is.

". . . the application will be allowed to use that information only in connection" --

THE COURT: Right. But where's the language that Mr. Loeser was reading to me about --

Is it "LOE Ser" or "LAW Ser"?

MR. LOESER: "LOE Sher."

THE COURT: Loeser. Sorry about that.

MR. LOESER: There's so many ways to say it wrong, and either one of those are preferable to the other one.

THE COURT: Mr. Loeser was reading to me some language about sharing pictures, sharing photos. Where is that?

MR. LOESER: The language is very clearly stated in my outline.

MS. WEAVER: But he said paragraphs 596 to 597.

MR. LOESER: Yeah, but I don't see it in 596.

MS. LAUFENBERG: I think it's Exhibit 40, Josh. That's what I have.

MS. WEAVER: What? Exhibit 40?

(Co-counsel confer.)

MS. WEAVER: So give us just a moment, Your Honor. Sorry.

(Co-counsel confer.)

MS. LAUFENBERG: Page 4 of Exhibit 40.

MR. LOESER: Okay. We found it.

THE COURT: "For example, if a friend gives an application access to a photo you only shared with your friends, that application could allow your friend to view or print the photo, but it cannot show that photo to anyone else."

Okay.

MR. LOESER: Okay. So this is an important disclosure.

And Your Honor raised the possibility and there was another question about whether this was a technological limitation or something else. And frankly, I don't think it matters what it is and if there are multiple interpretations, because as you noted, what matters for a motion to dismiss is, is the plaintiffs' interpretation a plausible one?

Mr. Snyder may have a different interpretation. And I'm not even sure what's better, if it's a technological limitation or merely authority. But the fact of the matter is, the allegation in the Complaint and the plaintiffs' reasonable interpretation of that provision is entitled to be credited. And on a motion to dismiss, it's a plausible one. So that's --

THE COURT: But the interpretation that you have put forward is that this disclosure implies that Facebook is actually doing something to limit the way third-party apps can use this data; and, in fact, Facebook is not doing anything to limit the way that third-party apps are using this data; and so

the disclosure is inaccurate in that sense. That's what you've put forward.

MR. LOESER: Correct. And that, again, if you look at the language and put yourself in the shoes of a Facebook user, when they read a statement that the information that their friend gives about them will only be used in regard with that friend, that seems like a plausible interpretation. It's kind of, it means exactly what it says.

Now --

THE COURT: Well, but -- and their response to that is, "Well, those were, in fact, the restrictions we imposed on third-party apps."

And you say, "But they didn't enforce those restrictions." Or do you say, "No, they actually didn't impose those restrictions, in the first place, on third-party apps"?

MS. WEAVER: So, first, with the first category, app developers like Cambridge Analytica, there are plenty of allegations in this Complaint, largely from --

THE COURT: Well, they didn't share the information with Cambridge Analytica.

MS. WEAVER: No. They shared it with Kogan. That's right. But they didn't audit --

THE COURT: So are you saying app developers like Kogan?

MS. WEAVER: Yes.

THE COURT: Okay.

MS. WEAVER: Kogan was an app developer, and they didn't audit any of these. The DCMS report said they didn't find one instance --

THE COURT: I understand your argument that they didn't audit; that, basically, they said, to use an analogy that my law clerk gave me this morning, they said that the curfew is 10 o'clock, but they never checked to see if anybody was home at 10 o'clock.

MS. WEAVER: Not a bad analogy.

THE COURT: But what I'm asking is: Do you agree that the curfew existed? Even if it wasn't enforced, do you agree that the curfew existed, or do you allege that there never was a curfew to begin with?

MS. WEAVER: So here's where it gets complicated. If you're talking about allowing, just the rule -- and let's set aside that the definition of "allow" may mean "to restrain or not permit," which is a -- but let's set that aside. Let's take their interpretation. "Allowing" means we had a rule that we didn't enforce.

Yes, I mean, I think that they said that there was a rule. I think that they didn't enforce it.

THE COURT: And by saying "allowed," in context, it contains with it an implication that they're going to do something --

MS. WEAVER: Right.

THE COURT: -- to enforce the curfew.

MS. WEAVER: Right.

THE COURT: I understand that argument.

MS. WEAVER: Hang on.

THE COURT: I understand that argument. I'm just asking, like, do you agree with -- because what they say is: We did, in fact, impose a curfew. They may not have followed the curfew, but we did, in fact, impose a curfew, however toothless.

Do you agree that -- do you accept that they imposed a curfew?

MS. WEAVER: So --

THE COURT: Because I couldn't find anything in the papers to suggest -- to indicate that they actually did impose a curfew. In other words --

MS. WEAVER: Oh, there --

THE COURT: -- I couldn't find anything in the papers.

Like, we don't have their agreements with the third-party apps; right? And so they say, "We had a policy restricting third-party use of this data," and they point to something in the Data Use Policy that doesn't seem to say that.

And so I'm trying to understand if you -- are you alleging that they had no curfew, or are you merely alleging that they had a curfew that was toothless?

MS. WEAVER: Both.

THE COURT: Okay. Where --

MS. WEAVER: So --

THE COURT: -- do you allege that they had --

MS. WEAVER: So --

THE COURT: -- no curfew?

MS. WEAVER: Right. So the whitelisted apps had no curfew.

THE COURT: I'm talking about regular third-party --

MS. WEAVER: Okay.

THE COURT: -- apps.

MS. WEAVER: But I don't want to let that go because that is a huge violation.

THE COURT: I get that.

MS. WEAVER: Business partners had no curfew.

THE COURT: I get that.

MS. WEAVER: So then we come to this point that we discussed in the last hearing which is the metadata stripping. They are saying --

THE COURT: Let's hold on.

MS. WEAVER: Well, because it disabled the ability of the app developers to comply with user privacy settings.

THE COURT: But I don't understand your metadata stripping --

MS. WEAVER: Okay.

THE COURT: -- allegations at all; so I would like to put those --

MS. WEAVER: Fine.

THE COURT: -- aside for a second and just try to get an answer to my question.

Do you allege in this Complaint that Facebook told users in its app settings they're only allowed to use your information in connection with your friends but that, in fact, Facebook did not impose that restriction? That there was --

MR. LOESER: Yes.

THE COURT: -- no such curfew; there was no such restriction?

MR. LOESER: Cambridge Analytica is the best example of it, and it makes sense to start with that since that's where the case started.

But Kogan got the information. 300,000 people downloaded the app. And from that, he parleyed that into 87 million people.

THE COURT: And you're saying -- here's what I'm asking.

MR. LOESER: Yeah.

THE COURT: Are you alleging that he had permission to do that or that he was not told that he could not do that? Because they say --

MR. LOESER: Yeah, I understand what you're saying.

THE COURT: They say, "We told Kogan, we told these other third-party apps that they're not allowed to do that."

MR. LOESER: Right.

THE COURT: Right?

And we have a separate discussion of whether that curfew had any teeth. But --

MR. LOESER: Right.

THE COURT: -- did they say, "We told Kogan, we told the other third-party apps they're not allowed to do that with your data"?

And I don't see anything that proves -- or I don't see any evidence that they, in fact, told Kogan and other third-party apps "You're not allowed to do that with the data." And so I'm wondering what your position is on that.

MR. LOESER: I think the best way to put it, Your Honor, is that we are evaluating these disclosures to decide if a user had a reasonable expectation of privacy or a reasonable expectation that something would not happen.

However -- whatever this means in terms of the power that an app had to do or not do something, when a user reads that disclosure, the reasonable interpretation of the user is something was not going to happen. And that thing that was not going to happen was that information was not going to be used for purposes other than in connection with their friend. So it's a thing that they were told was not going to happen that

did happen.

Now, I don't --

MS. WEAVER: Kogan --

MR. LOESER: I don't really know if that means -- I don't know, did Facebook tell Kogan "You're not supposed to use this information for persons other than friends"? I don't know if they said that or not. We'd have to look at the agreement between Facebook and Kogan.

But from the standpoint of these plaintiffs and the value and relevance of this disclosure, it's that they were told something was not going to happen and that's exactly what happened.

Now, Facebook, in their brief, talks about -- draws a somewhat different distinction here.

THE COURT: Well, but don't you think there's a difference between, like -- okay. One scenario is that Facebook doesn't say anything to the third-party apps about -- in an effort to limit their use of the data. That's one scenario.

The second scenario is Facebook tells the third-party apps, in its contracts or whatever, "You're not allowed to use third-party data except in connection with friends."

MR. LOESER: Right.

THE COURT: And then the third scenario -- oh, and then in that second scenario, Facebook does nothing to enforce

that.

MR. LOESER: Which is true. So we can put that aside because that happened.

THE COURT: And then the third scenario is that Facebook tells people that they can only use data in connection with their friends and then does something to enforce that, Facebook being the --

MR. LOESER: Right.

THE COURT: -- behemoth that it is.

And so it seems to me that all three of those scenarios are different, and I'm trying to figure out whether you're alleging the first scenario.

MS. WEAVER: So what we allege, actually, at pages 537 through 539 --

MS. LAUFENBERG: Paragraphs.

MS. WEAVER: Paragraphs. Sorry.

-- is that, in fact, Facebook --

THE COURT: Sorry. What? 537 and --

MS. WEAVER: To 539.

So there were a number of, sort of, Cambridge Analytica whistleblowers. Right? And Sandy Parakilas is one of them.

And he has stated and been interviewed by various regulatory agencies. He has testified.

THE COURT: This is the "better not to know" quote?

MS. WEAVER: Yes, exactly.

But what he's reporting is violation of the Data Use Policy and specifically what you're asking about and, also, at paragraph 470.

Now, you may or may not find Dr. Kogan credible, but it's a disputed fact, at paragraph 470, that he says the ability to gather people's Facebook friends' data without their permission was a Facebook core feature.

THE COURT: But where in Facebook's Data Use Policy does it say that developers violate the policy if they use it? Is it just that same disclosure that we're talking about?

MS. WEAVER: They do say, at iterative points in time, that "App developers will comply with your privacy settings."

Is that what you're asking?

THE COURT: Maybe. I don't know. I mean, I couldn't find any language that directed app developers to limit their use of my data.

MR. LOESER: Here's what I'm struggling with, Your Honor. I can't figure out which of those three things you think is better for the plaintiff.

THE COURT: Well, the third is the worst.

MR. LOESER: Because to me, all those roads seem to lead to Rome.

THE COURT: I think the third is bad for you. Right? If they said developers are only allowed to do this with your data and it were not the case that they did nothing to make

sure that that promise was kept but developers went around that, I think you would have a tougher claim.

MR. LOESER: So I'm glad I asked.

But I think, taking that right there, we know from the Cambridge Analytica reporting -- and, again, we don't have discovery in this case but -- from reporting, that Facebook did nothing to monitor. So we know they didn't do anything. And I'm just not sure what difference it makes when you're evaluating the disclosure. The fact that they didn't do anything means that we probably have a good negligence claim.

And -- but the disclosure, they're putting that disclosure in front of you, saying that based on this disclosure, users consented to every single thing that was given to apps.

And we're saying to you, well, wait a second. We know from Cambridge Analytica that this wasn't used just in connection with the friends. So the disclosure is an inadequate basis on which to find consent.

And so I think that discovery will enable us to figure out which of your three options really apply. And some of those options may be better or worse, frankly, for Facebook, particularly for a variety of the claims that we've asserted.

But from the standpoint of the questions you've asked us, which is "Let's talk about consent and these disclosures," it seems to me that any of those three options don't really make a difference, because the fact of the matter is, the disclosure

is -- at the very least, you can look at that disclosure and say there's different ways of interpreting it. And given that and given Ninth Circuit case law --

THE COURT: Well, what do you think about -- I mean, there was an interpretation that you didn't put forward that I asked about, which is whether you could interpret that language as imposing some sort of technological restriction on the apps. What's your view of that?

MR. LOESER: Yeah. I guess I have the same view. I'm just not sure what difference it makes. If you can -- you can parse the language and come to different understandings of what it means.

THE COURT: Well, I think it makes a difference because if they're using the word "allowed" in the sense that -- I don't know if it makes a difference for this motion, but I could see it making a difference at the end of the day, because if you interpret "allowed" in the way that they want -- that they and, I think, you have interpreted it in your papers -- and, in fact, they engaged in meaningful efforts to enforce those restrictions but it simply didn't work on occasion or simply didn't work sometimes, then I think you lose, probably.

MR. LOESER: Well, we relish that fight, because one of the things we learned in discovery, in the limited discovery that we got, was they didn't actually evaluate the terms of use

of any of the apps, the thousands and thousands of apps. Maybe it was physically impossible for them to do so because there are so many apps.

But we know that they didn't monitor what Kogan did, and we know that they didn't read these policies that supposedly dictated the terms vis-à-vis users and the app.

So I think we're going to be in a pretty good spot when it comes down to trying to sort out, based on discovery, well, what did Facebook really do to try and put some teeth into these disclosures that it made to people? They create an expectation of privacy. They create an expectation of conduct. Did they do anything to enforce that?

And I think that, frankly, it is an issue for another day, but I think it's an interesting issue for another day.

MS. WEAVER: And I would --

THE COURT: But do you think that -- it sounds like you may not think that that's a plausible interpretation of the language, that "We impose technological restrictions on third-party apps so that they can only use it in connection with your friends."

MR. LOESER: Frankly, Your Honor, I don't understand technology well enough to know if they could or couldn't do that. But I can read, and I can try and look at a disclosure and say: Does this assure people that something's not going to happen? And it seems like it did assure people, whether it was

a technological limitation or a permission, whatever it was.

THE COURT: Yeah, but you seem to be assuming that if it happened, then they didn't adequately disclose. I mean, even if one out of a thousand app developers misused information, that means this disclosure was inadequate.

MS. WEAVER: The facts that we allege are actually very different -- right? -- which is that they --

THE COURT: No, I know.

MS. WEAVER: Okay.

THE COURT: I know.

MS. WEAVER: Fine.

THE COURT: I'm just trying to --

MR. LOESER: We have kind of an N of one, which is Cambridge Analytica. Maybe it was an extremely unique circumstance, which I really don't think so.

MS. WEAVER: No. There are 400 other apps that they discontinued from the cite.

THE COURT: You guys are now arguing with each other?

MR. LOESER: Yeah, we're arguing with each other.

And Ms. Weaver will talk about the ***Rankwave*** case, which is a case that Mr. Snyder just recently filed against an app developer for, kind of looks like, doing what Cambridge Analytica or Kogan did, anyway.

And so it does seem like -- anyway, it's a factual issue. It's an interesting question. But I don't think it changes how

we interpret these disclosures.

THE COURT: Okay.

MR. LOESER: Let me run through a few other things on the problem with what they did vis-à-vis apps. And then I do want to jump to some of these legal questions that I think it's worth giving you some information.

THE COURT: I want to let people go soon, because we've blown through lunchtime. And so, anyway, why don't you take another ten minutes.

MR. LOESER: Okay. Well, I'll quickly deal with third-party apps.

So one of the things that you heard Mr. Snyder say -- and he said a lot -- and their briefs say, is that it's really clear to people how to control what apps get.

And I think that it's important to step back again and look at what the FTC said in 2011 about how these settings operated and how, in the privacy settings -- which people naturally believed would determine who could see their information, because that's what the settings say -- the privacy settings didn't refer to these app settings.

And it's very easy for Mr. Snyder to say now, in hindsight, "That's kind of ridiculous. Of course everyone knew you control apps with app settings and privacy with privacy settings," but that's exactly what the FTC said was not clear.

Now, in their brief, they explained --

THE COURT: And then they entered a consent decree, and than Facebook changed its disclosures.

MR. LOESER: I don't think they changed their disclosures so much as they supposedly changed their conduct. But they didn't.

So I also think it's important to note that the Statement of Rights and Responsibilities indicates -- there's some language about how people can control who sees their information through their privacy settings and app settings. And you've heard an interpretation that "Of course that means that you need to do both things." Okay?

And, again, when we're looking at plausible interpretations on a motion to dismiss, maybe that's what Mr. Snyder or Facebook thinks is a plausible interpretation, but the FTC came to a different conclusion. So there must be another plausible interpretation.

THE COURT: The FTC came to a different conclusion about that particular language?

MR. LOESER: They came to a different conclusion about the fact that when you go into the privacy settings and you think you're determining who can see your information, you're not actually controlling who can see your information because there's something else called these app settings.

Facebook has taken the position --

THE COURT: But I thought that that disclosure, I

thought that sentence in the terms came after the FTC came down on Facebook. Am I misremembering that? I thought that was a change in the disclosure language that emanated from the FTC proceedings. Am I wrong about that?

MS. WEAVER: Which language?

MR. LOESER: The SRR language about you control -- I'm not sure. I'll check.

But I think the point is, when Mr. Snyder looks at that language and says the statement that says you control through your app settings and your privacy settings, he says to you, "Well, that means you" -- and it's very clearly put in their brief -- "That tells users you absolutely have to go do both things in order to determine who can see your information."

And all I'll say on that is that if they wanted it to say that, they should have written that. "You need to be aware you need to set both of these things in order to control who sees your information." And that's not, not what they said.

THE COURT: I'm not sure I buy that argument, but okay. What else? What else should we make sure --

MS. WEAVER: Your Honor, I'd like to be heard on the --

THE COURT: -- we talk about?

MS. WEAVER: -- economic harm issue.

THE COURT: What?

MS. WEAVER: I would like to be heard on the economic

harm issue.

THE COURT: Okay. Yeah, very briefly.

MS. WEAVER: Okay. Great.

The question of whether to recognize a claim for economic harm comes down to whether the Court agrees that there must be value in the content and some loss by the plaintiffs.

And is it enough for us to allege --

THE COURT: What's the loss by the plaintiffs?

MS. WEAVER: Sorry? So the loss -- let me start with this, first of all, the value.

And Mr. Loeser just referenced a complaint. We have a copy here for the Court. This was filed on May 10th in Santa Clara County by Facebook against Rankwave, which is an app. And the Rankwave complaint asserts a breach of contract claim and a claim under Section 17200, just as we do here.

The heart of the claim is that Rankwave took users' content generated on Facebook, such as public comments and likes -- that's paragraph 22 -- as well as the level of interaction other users had with the app users' Facebook profile -- that's paragraph 23 -- and then they allege at paragraph 25, that the Facebook data associated with Rankwave's various apps received a valuation of $9.8 million.

THE COURT: Okay. But that's -- I mean, the question is: What loss did an individual plaintiff experience from this data being taken?

MS. WEAVER: Right. Well, the first -- the economic loss --

THE COURT: I view everything you just said to be irrelevant to your economic harm theory --

MS. WEAVER: So the first --

THE COURT: -- because the question is: What loss did a plaintiff experience?

MS. WEAVER: Okay. Then the second thing is that plaintiff -- or that Facebook itself describes in its disclosures with plaintiffs that their photos and videos could constitute intellectual property. And that's the concept here, that if plaintiffs -- let me find the --

Can we hand up the --

MS. LAUFENBERG: Yeah.

THE COURT: Well, is there any allegation that any particular plaintiff had their intellectual property rights damaged by these disclosures?

MS. WEAVER: Well, Your Honor --

THE COURT: I don't remember you arguing that in your brief.

MS. WEAVER: It's true. This is Exhibit 27 to the Duffey declaration. And when it says, "The permissions you give us" --

THE COURT: Okay. I believe you that that's what it says. I'm asking, does anybody allege that their intellectual

property rights were harmed --

MS. WEAVER: What we allege is that content and information was taken beyond the scope of the agreement. And if some of that content and information is intellectual property, you don't have to show a loss, just like a privacy harm. And they, themselves, here in this document, call it "intellectual property," in the user agreement. This is effective April 2018, before we filed suit.

And so when I have an agreement --

THE COURT: Did you argue this in your brief?

MS. WEAVER: We did not, Your Honor.

THE COURT: Okay. Anything else you want to make sure to discuss in the last five minutes?

MR. LOESER: Yes. One final thing, Your Honor. Your question asked about incorporation by reference, and I do think it's worth jumping back to that.

THE COURT: Yeah.

MR. LOESER: So specifically, you asked about incorporation by reference, and that assumes that the data policy becomes part of the contract --

THE COURT: Right.

MR. LOESER: -- this SRR, frankly.

The other part of that question that you're not asking about and I want to make sure you don't want to hear anything about is whether the data policy is itself a contract.

And we talked about that at some length previously. And I think, frankly -- I don't think it is under *Nguyen v. Barnes & Noble*. It just doesn't -- they don't have -- it's not conspicuous enough, and they don't use the language of assent that's required.

So that takes us into this realm that you're talking about now, which is incorporation by reference. And our brief talks about -- identifies a few cases that go through California law on this, and that's the *Shaw* case and the *Wollschlaeger* case and then *Anthem II* are the cases that -- frankly, that the defendants --

THE COURT: Right.

MR. LOESER: -- point to.

I think that if you look at *Shaw*, what's clear about incorporation by reference is that you have to indicate --

THE COURT: That was, like, a university professor who had a contract with his employer at UC Davis?

MR. LOESER: Right, for royalties. And the professor was handed a document, that he signed, that said he was entitled to, among other things, royalties on patents. And then UC Davis tried to get out of that agreement later.

And what the case stands for is the proposition that if you want to incorporate something by reference, it's not just a matter of referring to it. You also have to provide some indication of assent. There has to be some indication that

your purpose in referring to that document is to make it part of the contract.

THE COURT: So what are your best cases on the idea that the Data Use Policy is not incorporated by reference?

MR. LOESER: I think, frankly, the best case is -- frankly, it's *Shaw*. It's cases that found incorporation by reference because they so clearly indicate in *Wollschlaeger* as well and *Amtower v. Photon Dynamics*, which is 158 Cal.App.4th 1582, 2008 -- that's a case that interprets Wollschlaeger and provides what is a rational explanation of what it means.

THE COURT: What is that case called again?

MR. LOESER: *Amtower v. Photon Dynamics, Inc.*

But the principal, I think, is what really matters. And that's: Did the party provide some indication that they intended for this document to become part of a contract?

You can't just refer to the document. You have to provide some indication that you intended for it to be part of a contract.

So if you look at the language that Facebook actually uses here, which I have on Slide 20, which I believe is the Complaint at 243 and 244 -- and this is in 2009 -- this language existed from 2009 through 2018. And it's paragraphs 651 through 652.

THE COURT: Right.

MR. LOESER: And this is in the Statement of Rights

and Responsibilities, which is the contract between the parties. It says -- and we have a blowout here on the slide (reading):

"Your privacy is very important to us. We designed our data policy to make important disclosures about how you can use Facebook to share with others and how we collect and use your content and information. We encourage you to read the Data Use Policy and use it to help you make informed decisions."

So there's none of the language of assent, where they've made it clear to them -- they say, "We encourage you to read it." There's nothing in here that says, "And we make this part of our contract."

Now, if you look at the current terms, I think they provide a good indication of what you would need to have in order to actually provide this language of assent. And that's Slide 21, which refers to paragraph 656 in the Complaint. They have this nice bold disclosure now -- and this is, of course, post Cambridge Analytica -- which states:

"Our Data Policy and Your Privacy Choices. To provide these services, we must collect and use your personal data. We detail our practices in the Data Policy, which you must agree to in order to use our Products."

So that is language of assent. And they made it clear, starting in April nineteen- -- 2018, that they intended this document to be part of the contract.

So that, in a nutshell, Your Honor, is why we don't believe that the data policy is incorporated by reference into the contract.

THE COURT: Okay. Let me make sure I don't have any other questions for you.

So like I said, just submit a letter listing cases. No argument. No parentheticals. Just the cases you want me to read on the issue of subsequent changes to the terms of -- to the contract, to the terms of service, and I will read them.

Okay. Mr. Snyder, do you want to take five to seven minutes to --

MR. SNYDER: Yes. May I just take a one-minute restroom break?

THE COURT: Oh. Yeah, sure.

MR. SNYDER: Sorry. Thank you.

THE CLERK: Court is in recess.

(Recess taken at 1:28 p.m.)

(Proceedings resumed at 1:31 p.m.)

MR. SNYDER: Thank you, Judge.

THE COURT: We definitely have to let people go. So --

MR. SNYDER: Yes.

THE COURT: -- really, just five, seven minutes.

MR. SNYDER: Yes, Your Honor.

THE COURT: Whatever you think is the most important thing to respond to.

MR. SNYDER: Yes, Your Honor. I'll briefly respond to the contract point, the business partners point, the curfew point.

THE COURT: Okay.

MR. SNYDER: On the contract point, this is not, Your Honor, respectfully, a hybrid contract-disclosure matter. This is a pure contract interpretation question. And the canons of construction tell us that we do not need experts. We don't need -- this is not a food label case, because that's not a contract. That's something very different, different bucket of legal analysis.

THE COURT: But there's this reasonable --

MR. SNYDER: Yes.

THE COURT: -- Facebook user standard.

MR. SNYDER: For sure. Like any contract interpretation, what would be the reasonable reading of a contract and what is a plausible reading? There's no ambiguity here. You only need parol evidence when there's ambiguity.

(Court reporter interrupts for clarification.)

THE COURT: P-a-r-o-l.

MR. SNYDER: Sorry. And so, as I said repeatedly, the

privacy settings, the app settings, and all the other policies are clear and robust and can be interpreted and should be interpreted as a matter of law, as provided in the consent and disclosures required.

On the business partners, it's frustrating, Your Honor. The reason I stood up multiple times is -- and, unfortunately, this infects a lot of the plaintiffs' argument. It's either guesswork or just contrary to either their own pleading or, in this case, their own exhibits.

The reason Your Honor granted pre-motion discovery many moons ago is because the plaintiffs wanted that question answered. What did we tell our app developers?

And not only was there a curfew, but the plaintiffs cited the curfew in their submissions. That's Exhibit 25.

And on Exhibit 25, there is a provision, which we provided to them in discovery and which they submitted to Your Honor, which makes this frustrating because --

(Co-counsel confer.)

MR. SNYDER: Oh, this is the SSR.

And it says, "Special Provisions Applicable to Developers/Operators of Applications and Websites."

In a nutshell --

THE COURT: Wait. Hold on. Hold on. Hold on. Let me go there.

MR. SNYDER: Yeah.

THE COURT: Okay. All right.

MR. SNYDER: And this is --

THE COURT: This is from -- let's see. This is the SSR from November 15th, 2013; is that right?

MR. SNYDER: It seems that way, Your Honor.

THE COURT: Okay.

MR. SNYDER: But essentially, this made clear that we have a separate set of rules of the road for our app developers, called "Facebook Platform Policies"; and those, among other things, prohibit the Kogans of the world from selling data. And so there was a clear curfew.

THE COURT: Where is the curfew? What's the language that reflects the curfew? This is "Special Provisions Applicable to Developers/Operators of Applications and Websites."

MR. SNYDER: Right. And basically, it says to a developer:

> "You will not use" -- Number 3 -- "display, share, or transfer a user's data in a manner inconsistent with your privacy policy."
>
> And --

THE COURT: With "your" privacy policy?

MR. SNYDER: Right. This is a developer.

THE COURT: So, "Developer" --

MR. SNYDER: Correct.

THE COURT: -- "you have to have a privacy policy, and you will not use, display, share, or transfer a user's data in a manner inconsistent with" --

MR. SNYDER: Correct.

THE COURT: -- "your privacy policy."

MR. SNYDER: Right.

THE COURT: And so does Facebook dictate to the developers what their privacy policies are?

MR. SNYDER: Yes. It's in the Facebook Platform Policies, which are hyperlinked in this document. And it makes clear that Kogan was not permitted to sell the data to Cambridge Analytica and did so in violation of Facebook's Platform Policies.

So there was a curfew.

On the question of whether --

THE COURT: That's the thing, is I was looking --

MR. SNYDER: Paragraph 7:

"You will not sell user data. If you are acquired by or merge with a third party, you can continue to use user data . . . ."

THE COURT: Yeah, but I'm asking about this limitation: You will only use user data -- that third-party apps will only -- can only -- are only allowed to use your data in connection with your friends.

And so I'm looking in this -- I've been looking in this

paragraph 9, because it's what you cited to --

MR. SNYDER: Yes.

THE COURT: -- for an indication that third-party apps are only allowed to use my information in connection with my friends, and I couldn't find that from this paragraph.

MR. SNYDER: That's because we don't have the platform policies in front of us. I'm using this as a shortcut, Your Honor, because I have limited time, to answer the question: Was there a curfew?

And the curfew Your Honor referred to was: Did we tell third-party apps that they couldn't sell and/or transfer data? And we did.

THE COURT: And I guess all I'm saying is, it seems like from what has been submitted to me, it's not clear that there even was a curfew. But they are not contesting the notion that there was a curfew, however toothless. So it seems to me that it's not an issue for me to grapple with.

MR. SNYDER: Paragraph 6, just for the record, says:

> "You will not directly or indirectly transfer any data you receive from us to (or use such data in connection with) . . . ."

So we believe that the curfew was clear.

And I would just take issue with the "toothless" point. While the company has said publicly that it could have and should have done more, the fact is, the company, a day late,

took action, contacted the relevant parties, sought certifications. And this lawsuit that we filed, obviously, is further enforcement evidence.

As to business partners, Your Honor, again, very frustrating because they cite to a bunch of paragraphs where they engage in speculation without any factual support, but what is binding on them is their admission in paragraph 4 or 8 of the Complaint which makes clear that, whether it's private APIs or public APIs, there was no use of data by any of these so-called partners in excess of or in contravention of user settings designated by Facebook users.

App settings were never shut off. There's no evidence. There's no factual support. To the extent that that's alleged, it's wrong. And it's based on -- it's a conclusory allegation. And their own Complaint contradicts it, because it says in 408 that app developers only gained access with permission from the app user, which is the dispositive point here. Whether it's a whitelisted app, a so-called private API, or otherwise, one, never in excess of user permission; two, never was shut off those permissions as paragraph 4 or 8 acknowledges, which brings us to the next point, which is counsel's, you know, expression of concern for a comment I made about privacy.

So let me be very, very clear. Facebook scrupulously honors and respects privacy on its platform, but in accordance with users' privacy settings. And that's the part they want to

elide over.

Users had the absolute right to control who saw what. And to the extent a user made that privacy designation, Facebook scrupulously honored it.

And what's clear from this lengthy Complaint, when you look at 408, is that at no time did Facebook take any action in excess of those privacy settings, which brings us to the next point, which is, counsel ignored, throughout their argument, Facebook's specific warning that it cannot control what the Kogans of the world do with user --

THE COURT: I understand that.

MR. SNYDER: -- information.

Counsel said, "What difference does it matter?"

It matters.

THE COURT: I understand your argument on that point.

MR. SNYDER: The final point is -- I don't think you need anything on incorporation by reference, unless Your Honor wants something there.

THE COURT: No, no, no. That's okay. I just wanted to see if the plaintiffs had any better cases on that.

MR. SNYDER: And so in answer -- so counsel's first answer to your question, which was "Yes, these other business partners are just like all other apps," is the operative admission. It is the operative point, because nothing Facebook did, as opposed to Cambridge Analytica, exceeded the app

settings.

The final point is -- I guess I'm not going to say anything about standing.

THE COURT: I think that's probably a good choice.

MR. SNYDER: Unless Your Honor wanted me to.

But what happened here -- not standing. What happened here is exactly what we said could happen, and that's what, again, makes counsel's arguments so disingenuous.

We imposed a curfew on our app developers.

We told our users: If you share with friends, app developers will get your information.

So we told Kogan: You can't sell the information.

We told our users: Kogan might get your information if you give information to friends.

And then we told everyone: If you don't like these rules, you have so many different ways to protect your privacy. You can, of course, leave the system entirely. You can limit who sees what and who you share with. You can look at what apps and what the app policies are.

And so this is not the Wild West where the plaintiffs were without ample protection and ability to safeguard their privacy if they so chose.

And a number of users, Your Honor, in 2012, up to and including today, elected to change their privacy settings to make private what they wanted to keep private, and then to lose

control of the privacy when that was their decision on this social media platform.

Unless the Court has any other questions, the final thing I wanted to say, actually, is, without arguing standing at all, because I'm not going to, in the event that the Court rules, as the order suggested it might, that it finds standing based on some privacy harm, we would just respectfully request that the Court make clear which causes of action the Court finds standing exists under, because obviously there's --

THE COURT: Of course.

MR. SNYDER: -- a laundry list.

Because we may ask the Court, after reviewing the order if it goes against us on that point, to certify the standing question to the Circuit.

THE COURT: Okay.

MR. SNYDER: Thank you, Judge.

THE COURT: You seem like you really want to --

MR. LOESER: I just want to ask a question, Your Honor.

THE COURT: Good.

MR. LOESER: Mr. Snyder has said repeatedly that there's nothing in the Complaint in which we allege that privacy settings were violated. It's something that you asked about last time, too, whether we allege they violated privacy settings.

Why don't we submit just a document, with no argument, just identifying the paragraphs of the Complaint where we specifically allege that privacy settings were not complied with. Would that be useful?

THE COURT: Sure.

MR. LOESER: Okay. Thank you.

THE COURT: Why don't you do that on Friday also. And thank you very much.

MR. SNYDER: Thank you, Judge.

MS. LAUFENBERG: Thank you.

THE CLERK: Court is adjourned.

(Proceedings adjourned at 1:44 p.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Monday, June 3, 2019

Ana M. Dub, CSR No. 7445, RDR, CRR, CCRR, CRG, CCG
Official Reporter, U.S. District Court